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No. 80-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HONOLULU SPORTING GOODS COMPANY, LTD.,
A DIVISION OF ZALE CORPORATION, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

The basic question is whether the National Labor Relations Board must weigh the factors set forth in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), prior to imposing a bargaining order, where the Board, reversing its Administrative Law Judge, finds but one unfair labor practice and no pattern of, or other, employer misconduct.

The subsidiary question is whether, for purposes of determining a union's majority status based on authorization cards, the National Labor Relations Board may disregard its criteria of voter eligibility for secret ballot elections applied as of the date of the union makes its demand for recognition, and find majority status in bargaining order cases on separate legal grounds.

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IN THE

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OCTOBER TERM, 1980

No. 80-

HONOLULU SPORTING GOODS COMPANY, LTD.,
A DIVISION OF ZALE CORPORATION, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Honolulu Sporting Goods Company, Ltd., a Division of Zale Corporation, ("Honsport"), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals issued on May 5, 1980, (Appendix A, infra, pages 1a through 2a), not yet reported, enforced a Decision and Order of the National Labor Relations Board (Appendix B, infra, pages 3a through 81a reported at 239 NLRB No. 173 (1979).

JURISDICTION

On July 9, 1980, the Court denied the company's Petition for Rehearing and in the Alternative Rehearing en banc (Appendix C, infra, page 82a). The judgment below is reproduced as Appendix D, pages 83a to 86a) had been filed June 2, 1980. Juridiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

The provisions of the National Labor Relations Act as amended (61 Stat 16, 29 USC §151 *et seq.*) are set forth in Appendix E, infra, at page 87a.

STATEMENT OF THE CASE

After the Administrative Law Judge of the NLRB found the company innocent of any unfair labor practices, the National Labor Relations Board reversed. It ordered the company to bargain with Local 996 of the Teamsters Union, because it implemented a lawfully timed wage increase, the amount of which had not been announced to employees prior to the advent of the union. The Board concluded that while the timing of the announcement of the wage increase was lawful, the amounts of the increases, calculated in accordance with preexisting company policy, were, nevertheless, overly generous and thus violated §8(a)(1) of the Act. In its opinion, the Board offered no explanation for its issuance of a bargaining order (Appendix B, pages 3a to 26a).

A. The Facts

Honsport is a subsidiary of Zale Corporation, which has headquarters, including personnel officials, in Dallas, Texas. Its sporting goods division, which includ-

ed Honsport, underwent national management changes in early 1976. The new managers ordered revisions to compensation schemes for various groups of employees in Honolulu. During April, local Honolulu management met with and evaluated warehouse employees for periodic wage increases, and sent their recommendations to Dallas. The employees were then told to expect wage increases; the amounts were not specified. Honsport's actual recommendations were rejected as "inadequate" in Dallas and were returned back to Honolulu later in April. Dallas began a survey of Honolulu wages by contacting Sears and Penney's. (App. B, pages 7a to 24a).

In May, before the revised wage schedule was calculated, Local 996 obtained authorization cards from 5 warehouse employees. The union notified Honolulu management of a majority claim on May 11, 1976, having filed a petition for an election with the NLRB on May 10, 1976. Upon learning of the petition, Zale sent its labor relations attorney to Honolulu. He recommended, because denial of the increase could be considered a reprisal, that Honsport complete the revision to its "inadequate" wage scale. Substantial wage increases resulted for some employees in the petitioned-for unit. These increases were announced prior to any election being scheduled, and prior to any hearing to resolve questions of voter eligibility. Affected employees were told the raise had nothing to do with the union and that they were free to vote as they wished.

There was no anti-union campaign whatsoever, no interrogation, and no discrimination based on union activity.

After an NLRB hearing to determine voter eligibility, its Regional Director, on July 1, 1976, directed an election. She included among the eligible voters an

employee named Schubach, who had been hired before the union's advent to fill in for another employee, James, who was on leave for pregnancy at all material times. Thus, at the time the union made its majority claim, there were 10 eligible voters under existing NLRB election rules, and the union had at best only 5 authorization cards; it lacked a clear majority.

After the NLRB directed an election in a unit which expressly included Schubach by name (App. F), the union filed its unfair labor practice charge alleging that the granting of the wage increases violated the Act, and withdrew its petition. The employees never voted.

B. The Board's Decision and Order

The Board, reversing its administrative law judge,[1] found that the company violated §8(a)(5) and (1) of the Act by granting wage increases in an amount greater than the wage scale deemed "inadequate" in April, and by refusing to bargain with the union in May. The Board, in substance, held that while the timing of the employer's announcement of wage increases was not unlawful, the employer's announcement of wage increases higher than those finally calculated before the union's bargaining demand violated the Act.[2]

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[1] Judge Maurice M. Miller concluded in his December 15, 1977 opinion:

> In short, Respondent's partial nonconformity with newly defined wage increase criteria — which Vice President Gart had approved — carries no persuasive implication, within my view, that statutorily proscribed "interference" with Complainant Union's campaign was *intended*, rather than valid raises. Stated conversely, nothing within the relevant "totality of circumstances" which surrounded Respondent's final June 1976 retroactive raise payments would, *preponderantly*, warrant a determination that such raises had not been validly granted. (App. B, p. *78a*).

[2] The election process preferred by Congress may now be repeatedly frustrated by carefully timed petitions which coincide with pending wage reviews.

C. The Decision Of The Court Of Appeals.

The Ninth Circuit rejected Honsport's contention that the Board must articulate some reason why a bargaining order should issue, particularly where the employer has been found guilty of only one violation of §8(a)(1), and where the employer's acts lacked any of the serious types of misconduct "which usually are the hallmarks in cases where bargaining orders issue." *NLRB* v. *Jamaica Towing*, 602 F.2d 1100, 1104 (2nd Cir. 1979). The Court of Appeals sanctioned the Board's "per se" issuance of a bargaining order without the analysis of the factors which *Gissel* deemed pivotal in deciding a secret ballot election could not be held. In so doing, the panel of the Ninth Circuit, citing *NLRB* v. *Tischler*, 615 F.2d 509 (9th Cir. 1980), *NLRB* v. *Laars Engineers*, 332 F.2d 664 (9th Cir. 1964), *cert. den.* 374 U.S. 930 (1964), and *NLRB* v. *Pacific Southwest Airlines*, 550 F.2d 1148 (9th Cir. 1977).

The detailed analysis of factors deemed important by this Court over ten years ago in *Gissel* is thus reduced to a mere tautology:

> The evidence also supports the Board's findings that . . . the unlawful wage increase undermined the Union's strength and prevented a fair election. Accordingly, we affirm . . . its selection of a bargaining order as the appropriate remedy.(App. A, p. 2a).

The Ninth Circuit Court has thus sanctioned the Board's refusal to apply the *Gissel* criteria in a case where no pattern of employer misconduct exists, and where, after an election was directed in a unit larger than that first sought by the union, the election petition was

withdrawn. The lack of close analysis of the facts in Circuit Judges Hug, Schroeder and Pregerson's opinion is manifest: while the Board expressly found the raises lawful as to their timing, the Court considered the "timing and nature" of the raises in upholding the Board. (App. A, p. 1a, 2a).

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With This Court's Decision In *Gissel* And With The Correct Application Of *Gissel* Adopted By The First, Second, Third, Fourth, Fifth, Sixth, Seventh And District Of Columbia Circuits, While Joining The Eighth And Tenth Circuits In Condoning Disregard Of The *Gissel* Factors.

This case presents questions of substantial and recurring importance involving the denial to employees of their opportunity to vote by secret ballot to select or reject collective bargaining representatives and the repeated and unreasoned substitution of NLRB litigation as the path to Union representation.

Through such ad hoc reversals of its own Administrative Law Judges, the NLRB may be expected to increasingly deny employees of their opportunity to vote in NLRB elections through the devise of the "per se" bargaining order,[3] without regard to evaluating the specific factors set forth in *Gissel*.

Most circuit courts insist that the Board's imposition of bargaining orders include an analysis of the efficacy of conventional remedies. *See*, *NLRB* v. *Pilgrim Foods*,

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[3] *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951) provides the standard by which bargaining orders as well as violations should be evaluated. *NLRB* v. *General Stencils, Inc.*, 438 F.2d 894 (2nd Cir. 1971).

591 F.2d 110, 117 (1st Cir. 1979); *NLRB* v. *Jamaica Towing*, 602 F.2d 1100, 1104-1105 (2nd Cir. 1979); *NLRB* v. *Rapid Manufacturing Co.*, 612 F.2d 144, 150 (3rd Cir. 1979); *NLRB* v. *Appletree Chevrolet*, 608 F.2d 988, 1000 (4th Cir. 1979); *First Lakewood Associates* v. *NLRB*, 582 F.2d 416, 423 (7th Cir. 1978); *Donn Products* v. *NLRB*, 613 F.2d 162, 167 (6th Cir. 1980): *Peoples Gas System* v. *NLRB*, _____ F.2d _____, 104 LRRM 2224, 2231 (D.C. Cir. 1980)

In 1969-70, this Court in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969) sanctioned the use of bargaining orders in place of secret ballot elections in two limited situations: (a) where the employer has committed egregious and pervasive unfair labor practices (clearly not applicable here) or (b) where the unfair labor practices are not so severe and outrageous but still have the tendency to undermine a previously demonstrated showing of majority support for a union. In the latter situation, this Court held that Board may issue a bargaining order *if* the Board finds that the effects of the unfair labor practice are *indelible* and that on balance, majority support for the union as expressed through authorization cards would be best protected through a bargaining order.

Since *Gissel* was decided ten years ago, the Courts of Appeals have split as to the requisite specificity of Board findings necessary to substitute a bargaining order for the preferred secret ballot method of Employee choice. The time has come to resolve this conflict.[4]

This case presents the ideal vehicle for doing so, because it presents both unreasoned judicial approval as well as the NLRB's refusal to apply the *Gissel* criteria where only one inferential unfair labor practice was found.

[4] The Board itself has conceded that this conflict needs to be resolved. *Chandler Motors, Inc.*, 236 NLRB 1565, 1566 n. 8 (1978).

The Board's unreasoned issuance of bargaining orders when it disapproves only the amount of the employer's otherwise lawful wage increase during a union campaign does not comport with the very limited disenfranchisement of employees contemplated in *Gissel*.[5]

The Seventh Circuit has

> [C]onsistently held that *Gissel* contemplates that the Board must make "specific findings" as to the immediate and residual impact of the unfair labor practices on the election process and that the Board must make "a detailed analysis" assessing the possibility of holding a fair election in terms of any continuing effect of misconduct, the likelihood of recurring misconduct, and the potential effectiveness of ordinary remedies.

Peerless of America, Inc. v. *NLRB*, 484 F.2d 1108, 1118 (7th Cir. 1973); Accord, *First Lakewood Associates* v. *NLRB*, 582 F.2d 416 (7th Cir. 1978).[6]

The Fourth Circuit also requires specific findings and analysis as outlined in *Peerless of America, Inc.* v. *NLRB, supra, Appletree Chevrolet* v. *NLRB*, 608 F.2d 988 (4th Cir. 1979). The Sixth Circuit subscribes to this view, *Donn Products* v. *NLRB*, 613 F.2d 162 (6th Cir. 1980), as does the First Circuit, *NLRB* v. *Matouk Industries*, 582 F.2 125 (1st Cir. 1978); *NLRB* v. *Pilgrim Foods*, 591 F.2d 110 (1st Cir. 1979).

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[5] Indeed, the Board has not itself been consistent in issuing bargaining orders where a unilateral wage increase was granted. See *Reed Seismic Company*, 182 NLRB 158 (1970), *enf'd as modified*, 440 F.2d 598 (5th Cir. 1971), *American Leather & Suede Cleaners*, 189 NLRB 652 (1971), *Walgreen Company*, 221 NLRB 1096 (1975).

[6] When the issuance of a bargaining order is based on a single violation of §8 (a)(1) of the Act, the need for such findings is increased. *First Lakewood*, 582 F.2d at 424 n. 5.

Recently the Fifth Circuit had to undertake its own analysis of the record since "the Board has ignored the specificity requirement of *Gissel*." *Chromailoy Mining* v. *NLRB*, _____ F.2d _____, 104 LRRM 2897, 2995 (5th Cir. 1980).

In *NLRB* v. *Jamaica Towing*, 602 F.2d 1100 (2nd Cir. 1979) the Second Circuit refused to enforce "the issuance of a bargaining order in the absence of express consideration of those factors which, in the Board's view, preclude reliance on the preferred remedy of a second election." 602 F.2d at 1103-1104

The Third Circuit similarly believes:

> In light of the general and highly desirable practice in industrial relations of selecting bargaining representatives through traditional election processes, a rule requiring the Board to set forth a reasoned analysis justifying a bargaining order under *Gissel* is salutary. For the reasons set forth hereinafter, we adopt it.

NLRB v. *Armcor Industries*, 535 F.2d 239, 244, *Accord, Kenworth Trucks of Philadelphia* v. *NLRB*, 580 F.2d 53 (3rd Cir. 1978), *Rapid Manufacturing* v. *NLRB*, 612 F.2d 144 (3rd Cir. 1979).

The District of Columbia Circuit agrees:

> [B]efore we will enforce a bargaining order, we must be able to determine from the Board's opinion (1) that it gave due consideration to the employees' section 7 rights, which are, after all, one of the fundamental purposes of the Act, (2) why it concluded that other purposes must override the rights of the employees to choose their bargaining representatives and (3) why other remedies, less destructive to employees' rights, are not adequate.

Peoples Gas System v. *NLRB*, _____ F.2d _____, 104 LRRM 2224, 2231-2232 (D.C. Cir. 1980).[7]

In *Pilgrim Foods* , the First Circuit admonished the Board for its summary conclusions:

> Looking at the language in the Board's decision, we discover that it charged that the Company "undermined the Union's majority status" and that their practices were "so pervasive and widespread that their coercive effects cannot be eliminated by traditional remedies" and "a fair election is impossible." Although the language glows with Supreme Court sanctioned terms, the Board failed to go beyond semantics and give specific examples and precise reasons for this extreme remedy.

The Board's conclusion in this case only "glows" — it does not illuminate:

> As previously stated, the General Counsel contends that under the principles set forth in *Gissell Packing Company, supra*, a bargaining order remedy should be granted in this case. We agree, as the unfair labor practice committed by Respondent was so pervasive and extensive that the possibility of erasing its effects on the employees and insuring a fair election by the use of traditional remedies is slight. And, therefore employee sentiment, as expressed by authorization cards, is best protected by a bargaining order.

(App. B, p. 18a, 19a) Not only is this the exact type of conclusory language condemned by most Circuits, but also, such a conclusion of "indelibility" is unsupportable on its face where the Board reached its conclusion 13

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[7] The D.C. Circuit has noted that "other courts have encountered the same problem with the Board's perfunctory conclusions that a bargaining order is appropriate" *Peoples Gas*, 104 LRRM at 2232 n. 22; *NLRB* v. *Matouk Industries, supra.*

months after its own ALJ had dismissed the complaint, and over 30 months after the union withdrew the petition.

> To approve such a procedure would be to approve in effect the automatic issuance of bargaining orders in any case where the Board declared the misconduct of the employer to be "pervasive and egregious." Such a procedure would not accord with the standards declared in *Gissell* . . .

NLRB v. *Appletree Chevrolet*, 608 F.2d 988, 998 (4th Cir. 1979).

In conflict with the foregoing, the Tenth, Eighth and Ninth Circuits sanction bargaining orders issued with a mere "glow" of the "right" terms.[8]

The frustration of the Courts of Appeals since *Gissel* manifest,[9] and the Board's persistent refusal to

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[8] In *Ann Lee Sportswear, Inc.* v. *NLRB*, 543 F.2d 739 (10th Cir. 1976), the Tenth Circuit announced that it would accord "considerable discretion" to the Board and would enforce a bargaining order that was "within its discretionary zone." The Eighth Circuit similarly grants the Board undue latitude, even where the record is silent on the justification for such a drastic remedy. *Arbie Mineral Feed Co.*v. *NLRB*, 438 F.2d 940, 945 (8th Cir. 1971), Accord, *Drug Package, Inc.* v. *NLRB*, 570 F.2d 1340 (8th Cir. 1978).

[9] "Lastly, in the absence of any reference by the Board to the specific guidelines it follows in deciding whether to issue a bargaining order, there is an inadequate safeguard against precipitous or arbitrary action by the Board. . . The seeming inconsistencies in the Board's case law give rise to the impression that it is making *ad hoc* decisions on a matter of considerable importance in the fair administration of the National Labor Relations Act. This impression can only be dispelled if the Board, before issuing or declining to issue a bargaining order, sets forth the relevant standards as they have evolved in its decisional law and describes the applicability of these standards to the facts of the case at hand." *Jamaica Towing.*, 602 F.2d at 1104-1105 (citations omitted).

justify bargaining orders will inevitably burden the Courts and this Court with continual protests until the conflict is resolved.[10] Now, ten years after *Gissel*, the Board must be required to preserve the election process in the absence of serious employer misconduct genuinely precluding a fair election. A wrong judgmental choice between "reprisal" and "benefit" is not such misconduct.

II. By Excluding An Eligible Voter From The Unit For Purposes Of Calculating A Card Majority, The NLRB Departed From All Known Precedent Which Constitutes A Clear Abuse Of Discretion.

In arbitrarily excluding employee Schubach, (expressly declared eligible to vote by the Regional Director,) (App. F) from the bargaining unit for purposes of calculating a majority, the Board sua sponte[11] decided that she did not count. To accomplish the exclusion of an employee present in the unit, both when the union's demand and the subsequent wage increase occurred, the Board had to ignore the two established tests for inclusion of an employee in a bargaining unit.

The first test is known as the "reasonable expectation test" and focuses on the employee's reasonable expectation of permanent re-employment. *NLRB* v. *New England Lithograph*, 589 F.2d 29 (1st Cir. 1978). The other "date certain test" examines whether a definite ter-

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[10] See generally, "*After All, Tomorrow is Another Day": Should Subsequent Events Affect the Validity of Bargaining Orders?* 31 Stanford L. Rev. 505 (1979).

[11] The ALJ never fully discussed the majority issue, finding that no unfair labor practice had been committed.

mination date has been set for a temporary employee. The Ninth Circuit has acknowledged the existence of these two tests without adopting either,[12] and here ignored both.

The Board applied the reasonable expectation test to James, who was on leave of absence and included her in the unit. (App. B 9a, n.11, 17a, n.21.) But no legal test is used to exclude Schubach, whom the Regional Director expressly included.[13] In a case such as this one where the union's majority, if it does exist, is a naked one, the Board should be required to announce why it so clearly ignored the two tests it had heretofore employed in election cases.

This anomaly underscores the Board's excessive zeal to issue bargaining orders, in disregard of employees' right to vote.

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[12] *NLRB* v. *Western Drug*, 600 F.2d 1324, 1325 (9th Cir. 1979).

[13] As a matter of law, James' expected date of return from a leave for childbearing could not be presumed. *Cleveland Board of Education*, v. *LaFleur*, 414 US 632 (1974)

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 79-7057

HONOLULU SPORTING GOODS, INC.,
A SUBSIDIARY OF ZALE CORP., *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

MEMORANDUM

Petition to Review an Order
of the National Labor Relations Board

Before: HUG, SCHROEDER, and PREGERSON, *Circuit Judges.*

The National Labor Relations Board found that Honolulu Sporting Goods, Inc. ("the Employer") violated section 8(a)(1) & (5) of the National Labor Relations Act by refusing to bargain with Hawaii Teamsters Local 996 ("the Union") and by granting an unusually large wage increase after the Union demanded recognition and petitioned for an election. Among other remedies, the Board ordered the Employer to bargain with the Union. The Employer petitions this court for review of the Board's order, and the Board cross-petitions for enforcement of the order.

The Board disagreed with the Administrative Law Judge in this case, but that does not change the standard of review. *See NLRB* v. *Tischler*, No. 78-3435, slip op. at 2359 (9th Cir. March 19, 1980). Although we give special weight to the credibility findings of the Administrative Law Judge, we must enforce the Board's order if the Board correctly applied the law and if the Board's findings of fact are supported by substantial evidence. *See id.*

In light of the timing and the nature of the wage increase, we hold that substantial evidence supports the Board's finding that the Employer shifted the wage schedule upward for the purpose of undermining support for the Union. *Cf.*

NLRB v. *Laars Engineers, Inc.*, 332 F.2d 664, 667 (9th Cir.), *cert. denied*, 379 U.S. 930 (1964) (inference of unlawful purpose drawn from coercive timing of otherwise lawful wage increase). The Board properly found a violation of section 8(a)(1) of the Act.

The evidence also supports the Board's findings that the Union enjoyed majority support at the time that it demanded recognition, and that the unlawful wage increase undermined the Union's strength and prevented a fair election. Accordingly, we affirm the Board's findings of a violation of section 8(a)(5) and its selection of a bargaining order as the appropriate remedy. *See NLRB* v. *Pacific Southwest Airlines*, 550 F.2d 1148 (9th Cir. 1977).

The petition to enforce the order of the Board is granted.

APPENDIX B

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 37—CA—1273

HONOLULU SPORTING GOODS CO., LTD.,
A SUBSIDIARY OF ZALE CORPORATION

AND

HAWAII TEAMSTERS AND ALLIED WORKERS, LOCAL 996, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

DECISION AND ORDER

On December 15, 1977, Administrative Law Judge Maurice M. Miller issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed limited cross-exceptions and an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

Shortly after the Charging Party (the Union) requested recognition and filed a petition for an election in a unit of Respondent's warehouse, employees, Respondent granted those employees a massive pay raise which encompassed both small step increases based on merit and longevity and a radical upward revision of the entire applicable wage structure. The Administrative Law Judge found the entire pay raise lawful, and not vilative of Section 8(a)(1) of the Act, on the grounds that: (1) prior to gaining knowledge of the Union's organizational campaign, Respondent conducted per-

formance reviews for some of its employees and informed them that wage increases based thereon had been recommended; and (2) the complete revision of the basic wage structure was consistent with a provision in the policy and practice manual of Respondent's parent corporation which states that Company pay ranges reflect the prevailing pay scale in the local geographic area and are based on wage surveys taken in the region involved. We find merit in the General Counsel's exceptions to these findings of the Administrative Law Judge because, although it is clear that the employees would have been granted their small step increases without regard to the existence of their union activity, we are convinced from the record evidence that, but for the Union's organizational campaign, Respondent would never have instituted the major revision in its basic wage structure during that particular period of time.

1. Respondent,[1] a subsidiary of Zale Corporation, is engaged in the retail and wholesale distribution of sporting goods equipment in the State of Hawaii wherein it operates four retail stores and the Honolulu warehouse facility which is the subject of this proceeding. Zale, headquartered in Dallas, Texas, operates over 1,600 retail outlets nationwide, administering them through a number of merchandising groups and operating divisions — Honsport being under the administrative control of Zale's Sporting Goods Division.[2] During the time period relevant to the unfair labor practices alleged herein, Miles Baidack served as Respondent's general manager with supervisory authority over all Honsport employees. He, in turn, was immediately responsible to William Gart, the Division's vice president for operations.

The record[3] shows that, during the latter half of 1975, General Manager Baidack formulated pay scales for Respon-

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[1] Also referred to hereinafter as Honsport.

[2] Referred to hereinafter as the Division.

[3] In setting forth the facts hereinafter, we rely on record testimony which either stands uncontradicted or was specifically credited by the Administrative Law Judge.

dent's warehouse employees.[4] Subsequently, these proposed pay scales were approved by the Division's president, with a designated effective date of October 1, 1975. Although Zale's policy and procedure manual states that company pay ranges reflect prevailing wages paid in the local area and are based on wage surveys conducted therein, the record herein shows that no survey of wages paid by other Honolulu employers was conducted by Respondent, by the Division's personnel department, or by Zale's wage and salary section.[5] And, in fact, the pay scales adopted set forth wages which were well below the local prevailing rate.

On March 8, 1976,[6] Zale officials, Blumenthal and Gart (the Division's president and vice president, respectively), paid a week's visit to Hawaii for the purpose of conducting an in-depth review of Honsport's operations and conferring thereon with Baidack. While there, Gart specifically inquired as to the wages earned by each warehouse employee. Later that week, he instructed Baidack to immediately place Honsport's retail sales employees on a commission-based pay plan, but never suggested, or even discussed, any change in the wage structure for warehouse personnel. He did, however, direct Baidack to initiate promptly performance reviews for the warehouse

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[4] One pay scale, designated for warehousemen provided for a $2.40-per-hour starting rate, $2.55 after a 3-month probationary period, and thereafter, eight set increments of 10 or 15 cents each (up to a maximum or $3.70). The other pay scale, for warehouse clerks and a truckdriver, started at $2.60 (after 3 months prior Honsport employment), with ten 15-cent increments (up to a maximum of $4.10).

[5] Zale's manual states, in pertinent part, as follows: "To insure that employees are paid fairly, most jobs are included in a systematic pay program developed by the Wage and Salary Section of the Corporate Personnel Department and administered by Division Personnel Departments. The pay program bases the pay range for each job on the rates paid for similar jobs in the community."

[6] All dates hereinafter are in 1976, unless otherwise indicated.

employees and to forward such reviews to him in Dallas, together with recommendations for pay raises based thereon.[7]

On March 25, after his return to Zale's Dallas headquarters, Gart sent Baidack an 11-page memorandum setting forth detailed directions for a wide variety of changes in Honsport operations, but, again, nothing concerning warehouse wage rates was mentioned—although reference was made to the implementation of sales commission payments for retail personnel.

On April 10, Honsport's warehouse manager conducted performance reviews for five of the nine warehouse employees, after which he told them that they would receive wage increases—the amounts of which were not specified. These reviews were then submitted to Baidack who, based thereon, made pay raise recommendations (ranging from 10 to 30 cents per hour)[8] on the appropriate company forms which he then forwarded to Gart in Dallas. However, contrary to his instructions, Baidack failed to attach the related performance reviews to the forms which contained his recommendations. Approximately April 15, Gart returned Baidack's forms with a note stating that the raise recommendations were inadequate and asking Baidack, upon receipt thereof, to notify him so that they could discuss the matter further. Thereafter, about May 10, Baidack inquired of Jerry Martin—the Division's controller who was visiting Honsport operations at the time—as to why his pay raise recommenda-

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[7] As found by the Administrative Law Judge, Gart had previously instituted a policy mandating twice-yearly performance reviews to be completed in September and March, with pay raises based thereon to be effective on October 1 and April 1 of each year.

[8] The record indicates the amount of the pay raise recommendations with respect to only four of those employees, which were as follows: employee Yamamoto—10 cents (from $2.60 to $2.70); employee Hasegawa—30 cents (from $2.40 to $2.70); employee Takahara—10 cents (from $4 to $4.10); and employee Leomo—15 cents (from $2.55 to $2.70).

tions had been rejected and Martin replied that, "They'll get back to you on it." Then, on May 12, Gart sent Baidack another memorandum in which he criticized with specificity, and made information requests relative to, Baidack's recommended pay raises and pay structure for department heads and assistant managers in Honsport's retail stores. But, once more, no reference whatever was made to the warehouse pay structure or to Baidack's earlier recommendations for warehouse employee pay raises.

On May 10 or 11, Harlan Reed, the Union's business agent, initiated a telephone conversation with Baidack during which he claimed to represent a majority of Honsport's warehouse employees, requested recognition, and stated that a representation petition had been filed with the Board's Subregional office. Baidack answered that, when received, he would refer the representation petition to Zale's management representatives for response.

About May 13, when Baidack received formal notification from the Board that the representation petition had been filed, he informed Gart and other Zale officials as to what had transpired with respect to Reed's telephone call and the petition. Their response was to tell Baidack that Norman Landa, Zale's assistant general counsel for labor relations, would come to Honolulu to look into the matter and that, in the interim, Baidack should refrain from taking any action which might "create problems."

Landa arrived in Honolulu on May 24. Before leaving Dallas, however, he secured from Zale's wage and salary administrator comparative data on the warehouse wage rate structures utilized by Sears, Roebuck & Company and J. C. Penney Company at their Honolulu facilities, as well as data on Zale's own wage structure for its Dallas warehouse personnel. The record testimony of Respondent's witnesses sheds no light on the reason or motivation for this inception of Zale's interest in Honsport's warehouse wage structure. None of the consultations and exchanges of memorandums between Gart and Baidack during the previous 3 months even touched on

this subject, although comments and instructions pertaining to the wage structure for retail store employees and managers had been made on a number of occasions.

Upon his arrival in Honolulu on May 24, Landa had a discussion with Baidack on the situation generated by the Union's petition. Landa expressed concern that the wage increases promised some employees in conjunction with their April performance reviews had not been implemented, stated that the warehouse employees appeared underpaid, and told Baidack to contact the personnel directors of other local businesses for the purpose of conducting an area wage survey. Baidack testified without contradiction, that this was the first occasion on which he had been instructed to perform an area wage survey.

Later that same morning, Landa addressed a meeting of the warehouse employees. He told them, *inter alia*, of the Union's petition, of the possibility that an election would be held, and that the law protected them in their right to vote for or against representation. In response to an employee question as to how Honsport determined its compensation schedule for warehouse employees, Landa replied that company policy was to pay "competitive rates" within the local area.

During May 24 and 25, Landa and Baidack took swift action. They contacted other Honolulu employers, gathered data, drew up an area wage survey, and fully drafted completely new wage structures covering the two categories of Honsport warehouse employees. Their proposed new pay scales set forth wages which, varying somewhat with each longevity step, ranged from 33 to 40 percent above the wages provided for in the then-current schedules.[9]

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[9] The new pay scale for warehousemen provided for a $3.30-per-hour starting rate, $3.47 after probation, and, thereafter, eight increments set at 6-month intervals and ranging from 17 to 24 cents each (up to a maximum of $5.11). The raise for warehouse clerks and the truckdriver started at $3.57 (after 3 months prior employment), with 10 set 6-month increments ranging from 18 to 27 cents each (up to a maximum of $5.75). For comparison with the rates then current, see fn. 4, *supra*.

The next day, May 26, Landa telephoned Gart in Dallas. He told him the results of the wage survey, stated his view that Honsport warehouse wages were low, read out the details of the proposed new wage schedules, and requested an immediate decision by Gart on authorizing implementation of the new rates. Gart then gave his approval.

Subsequently, Landa and Baidack determined specific new hourly wage rates for individual employees by applying the appropriate step of the new schedules in accord with each employee's length of service with Honsport. On this basis, most employees were awarded new rates which encompassed a rise of one or two longevity steps on the pay schedule *plus* an additional increase derived from the 33 to 40 percent upward revision in the schedules themselves. Employees Yamamoto, Hasegawa, Leomo, Culkin, and James were granted rates which ranged from 44 to 48 percent above those which they had previously received; and employees Ragasa and Takahara were raised by approximately 36 percent,[10] all such raises being made retroactive to May 1.[11] By way of contrast, the

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[10] The two remaining employees, Alvin Moratin, Jr., and Richard Moratin, are the sons of Honsport's warehouse manager. Although Moratin, Jr.'s new wage rate was set at, or near, the appropriate longevity step of the applicable schedule, his total raise amounted to only 10 percent. This lesser increase was probably a result of the fact that his earlier rate of $3.40 per hour appears to have been arbitrarily set—as it failed to match any designated rate step on the old schedules. With respect to Richard Moratin, he only commenced Honsport employment on May 4 and, as the new schedules were made effective retroactive to May 1, the record data on his wage rates only reflects the new schedule. Thus, the difference between the rate he was to be paid when initially hired and the rate which later became retroactively effective is unknown.

[11] As employee James was on maternity leave during all of May and June, her pay raise did not become effective until her return to work in July. Her temporary replacement, Karen Schubach, was given no increase whatever and Respondent presented no evidence relating to her level of compensation.

record indicates that the rate schedules and merit increases adopted by Honsport in October 1975 yielded the warehouse employees total pay raises which ranged from 4 to 8 percent.

On May 28—just 4 days after Landa's arrival in Honolulu—the employees were called to a meeting where Baidack told them that they would receive pay raises which were the product of both their April performance reviews and a revised wage structure based on a survey of comparable jobs in Hawaii. He said nothing to connect these raises with the Union's organizational campaign. Rather, he asserted that—at the time the April performance reviews were conducted—Zale officials in Dallas were reviewing and reworking the wage rate structure for all warehouse facilities. And that the revised wages were being applied retroactive to May 1 because the new rate structure had not been completed on time.

We conclude that Baidack's above-noted assertions to the warehouse employees concerning the origin of Honsport's revised wage structure were patently false. Respondent did not produce a shred of evidence indicating that Zale was, in fact, reviewing or reworking the warehouse wage structure in April. To the contrary, the record evidence establishes that no action was taken in that regard until after Zale officials, including both Landa and Gart, learned of the Union's demand for recognition and the filing of its representation petition. It is also clear from the record testimony that, when determined on May 25, the step increase component of the pay raise was based soleiy on length of service and was not a merit increase based on performance reviews.[12]

With respect to the granting of employee step increases, Zale's policy and procedure manual stipulates that employees should be given performance reviews at least once every 12 months and that, if their performance so warrants, a pay raise recommendation should then be forwarded to higher manage-

[12] It is noted that only five of Honsport's nine warehouse employees received performance reviews in April or thereafter.

ment. Further, as detailed at footnote 7, *supra*, the Administrative Law Judge found that Gart had instituted a policy mandating that such reviews and pay raise determinations be made twice yearly. And, as the previous pay raise was made effective on either October 1 or November 1, 1975,[13] both employees and management could reasonably be expected to anticipate that the next set of pay raise recommendations would become effective on or about May 1. Moreover, as Gart directed Baidack in March to make such recommendations and Baidack did so in April, it is established that Respondent took steps to implement its performance review/pay increase policy prior to the May 6 advent of the Union's organizational campaign. Therefore, to the extent that the pay raise at issue herein encompassed step increases based on merit and/or employment longevity, we conclude that such grant did not interfere with the Section 7 rights of the employees and was not, by itself, violative of Section 8(a)(1).

With regard to Respondent's 33- to 40-percent upward revision in its basic wage schedules, however' we conclude to the contrary. The Administrative Law Judge, in holding that Respondent's wage schedule revisions were lawful, found that Landa, in initiating the wage survey and formulating the new schedules, was merely pursuing to completion the course of conduct which Baidack should have pursued before the Union's campaign began and, therefore, Respondent's wage schedules cannot be found to have been altered by virtue of the Union's presence. We disagree, as such finding is based on a mechanistic reading of Zale's written policy statements

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[13] While the prior pay schedules had October 1, 1975, as their designated effective date, the employee pay records introduced into evidence indicate that the employees may not, in fact, have received any pay raises until November 1, 1975. The record does not establish the extent to which such raises resulted from individual employee step increases, new pay schedules, or a combination of both.

which ignores the considerable evidence, discussed *infra*, pertaining to the manner in which those policies were actually implemented in the past. We also note that, although Baidack formulated the October 1975 wage schedules without conducting the appropriate area wage survey, such schedules were nevertheless approved by the division's president. And when Gart, upon inquiry in March, was informed as to the wages paid each warehouse employee, he indicated no concern as to whether they reflected the locally prevailing rates. By way of contrast, during the same period of time he did initiate action and assert critical suggestions relative to the pay structures for retail store managers, department heads, and sales personnel.

While Zale's policy and procedure manual does provide, as the Administrative Law Judge found, that employee pay ranges should reflect local prevailing rates and be based on area wage surveys, it sets forth no criteria as to how often (or under what circumstances) such rates should be reviewed or such surveys should be taken. Moreover, Respondent's witnesses, Landa and Richard Horton,[14] testified that Zale had no policy respecting the frequency of area wage surveys, and that, in practice, such surveys are taken in response to indications of excessive employee turnover, employee inquiries on the subject, or specific suggestions from management officials. Here, there was no indication of excessive employee turnover, and inquiries by employees and management officials were only made in response to the Union's organization campaign. Thus, while the process used for determining the rates set forth in Honsport's revised pay schedules, i.e., the taking of an area wage survey, was in conformance with company policy, there was no company policy which mandated the revision of schedules or the taking of surveys at the time such actions were taken herein. Further, the record establishes that—wholly apart from the statements in the policy

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[14] At the time of the hearing herein, Horton was Baidack's successor as Honsport general manager. Previous to that, he served for over 6 years in various Zale management positions.

manual—no management official took any action directed at securing wage-schedule revisions or the taking of area wage surveys relative to warehouse employees until after the Union requested recognition and filed its petition. And the, such action was initiated by Landa, an attorney whose responsibilities were in the area of labor relations, rather than by officials whose responsibilities normally included wage, salary, or personnel administration.

The validity of wage increases or other benefits during the pendency of represen tation petitions turns upon whether they are granted "for the *purpose* of inducing employees to vote against the union."[15] And a lawful purpose is not established by the fact that the employer who took such action did not expressly relate the granted wage increases to the organizational campaign. For, as the Supreme Court observed in *N.L.R.B* v. *Exchange Parts Company, supra* at 410, "the absence of conditions or threats pertaining to the particular benefits conferred" is not "of controlling significance" Under settled Board policy, a grant or promise of benefits during the critical preelection period will be considered unlawful unless the employer comes forward with an explanation, other than the pending election, for the timing of such action.[16] No such explanation can be found in the present record.

As previously indicated, we agree with Administrative Law Judge that the decision to grant step increases was made before the advent of the Union's campaign and was not in response to the Union's efforts. However, in view of all the facts and circumstances set forth above—particularly the timing and extensive nature of the upward revisions in Respondent's basic warehouse rate structures—we find that the May 28 pay raise (effective retroactive to May 1) was granted in response to the Union's campaign and was, therefore, violative of Section 8(a)(1) of the act.[17]

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[15] *Tonkawa Refining Co.*, 175 NLRB 619 (1969), citing *N.L.R.B.* v. *Exchange Parts Co.*, 375 U.S. 405, and *Russell-Newman Mfg. Co., Inc.* v. *N.L.R.B.*, 370 F.2d 980 (5th Cir. 1966).

[16] *The Singer Company*, 199 NLRB 1195 (1972).

[17] *Montgomery Ward & Co., Incorporated*, 220 NLRB 373 (1975) enfd. 554 F.2d 996 (10th Cir. 1977).

2. The General Counsel asserts that, as of the date of its recognitional demand, the Union represented a majority of Respondent's employees; and because Respondent thereafter undertook a course of unlawful conduct to defeat the Union's representative status, its failure to recognize and bargain with the Union violated Section 8(a)(1) of the Act—requiring a bargaining order remedy within the principles set forth in *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575 (1969).

We agree with the Administrative Law Judge, for the reasons stated by him, that, as of May 10, the Union had secured signed aurhorization cards from five of the employees in the appropriate bargaining unit,[18] and that, immediately thereafter,[19] it claimed majority status and made its demand

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[18] The parties are in agreement that the appropriate unit herein is:

All full-time and regular part-time warehousemen and truckdrivers employed by Respondent at its facility located at 2868 Kaihikapu Street, Honolulu, Hawaii; excluding office clerical employees, guards and supervisors as defined in the Act.

This is the unit found appropriate by the Regional Director in her Decision and Direction of Election in Case 37-RC-2245 (issued July 1, 1976). In further accord with that decision, the parties also agree that the warehouse freight claims clerk and inventory control clerk are plant clerical employees and, accordingly, also included in the unit.

Subsequent to the issuance of the complaint herein, the Regional Director dismissed the representation petition in Case 37-RC-2245, subject to reinstatement, if appropriate, upon the Union's application after disposition of the instant unfair labor practice proceeding.

[19] The Administrative Law Judge credited testimony which dated the Union's demand for recognition as occurring during either the mid-afternoon of May 10 or the morning of May 11. We do not find it necessary to determine which of those two dates is correct. However, for purposes of reference, we shall hereinafter use the date of May 11, which is the date alleged in the complaint.

for recognition. But to properly evaluate the above-noted assertions of the General Counsel, additional issues must be considered and resolved. For Respondent contends that: (1) the five employees who signed union authorization cards did not constitute a majority of the appropriate unit's employees; (2) the authorizations were tainted because the Union offered to waive initiation fees in exchange for employee signatures on the cards; and (3) even if Union represented an employee majority and Honsport's grant of wage increases was violative of Section 8(a)(1), under the circumstances of this case a bargaining order is not justified.

At all times relevant herein, there have been a total of nine job positions in the bargaining unit. For a number of years, one of those positions has been filled by employee Carol James, the inventory control clerk' However, sometime in April James was granted maternity leave under the provisions of Zale's maternity leave policy as set forth in its policy and procedure manual. She subsequently returned to work on July 1. During her absence, Karen Schubach was hired to replace her temporarily and held that position on both the date of the Union's recognitional demand the date on which Respondent announced the wage increases found herein to have been unlawful. Schubach resigned her employment by mid-June. Neither James nor Schubach signed authorization cards and their inclusion or exclusion from the unit is, thereby, relevant only in determining the number of employees in the bargaining unit.

The parties agree that James is properly includable in the unit as she had, at all relevant times, a reasonable expectancy of reemployment. However, Respondent would include Schubach as well, while the General Counsel and Charging Party would exclude her as a temporary employee.

Baidack, Honsport's general manager at the time these events occurred, testified that Schubach was hired by office manager Penny Austin, his immediate subordinate, who reported to him that Schubach was hired as a temporary employee who would remain employed until James' return

from leave; and that a tentative return date of July 1 had been set for James. Respondent's witness, Landa, conceded that his understanding was that Schubach was hired to replace James until she came back to work, but denied knowing whether Schubach was or was not to be terminated at that time. However, he further admitted that the pay raises announced on May 28 (and made effective retroactive to May 1) for all regular employees were never granted to Schubach; and none of Respondent's management witnesses asserted any intent or plan for employing more than nine employees in the Honolulu warehouse facility.

On the subject of maternity leave policy, Zale's manual states, in part, as follows:

> When an employee requests a maternity leave, the employee's job should not be permanently filled during such leave unless the job is of such a nature that it must be filled and can only he filled if filled by a permanent replacement. The job may be filled on a temporary basis, but any individual hired on such a temporary basis must be informed that the job is a temporary one due to a maternity leave.

Respondent contends, in effect, that this provision is of no significance because the issue of whether a replacement is a temporary or permanent employee is determined under the facts of each particular case and it has not been established whether or not James' position was one which could only be filled on a permanent basis. However, Respondent, although presumably in possession of its own employment records[20] and other personnel data, makes no assertion that James' job had to be filled by a permanent replacement or that Schubach was hired on anything but a temporary basis.

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[20] We note that the record herein contains copies of Respondent's basic employment records—setting forth pay rates, job titles, dates of hire, labor grades, and other related information—for every employee in the bargaining unit, except Schubach.

Considering, cumulatively, Baidack's testimony as to the circumstances of Schubach's hire, the provisions of Zale's maternity leave policy, Landa's admissions — particularly the withholding from Schubach of the wage increases given all regular employees — and the failure of Respondent to show that anyone in management ever even considered retaining Schubach after James' return, we conclude that Schubach was hired as a temporary employee and that she held such status as of the date the Union demanded recognition and thereafter.[21] See *Fearn* v. *International, Inc., Eggo Foods Division*, 209 NLRB 232 (1974). Accordingly, we find that the bargaining unit consisted of nine employees as of that date and the Union's majority status, or lack thereof, must be measured against this number.

In *N.L.R.B.* v. *Savair Manufacturing Co.*, 414 U.S. 270 (1975), the Supreme Court held that, where signed authorization cards are the basis for an election, a union may not promise initiation fee waivers to those who sign cards before the election and withhold such waivers from others. Respondent asserts that the authorization cards herein are tainted because, in soliciting employee signatures thereon, Union Business Agent Reed contravened *Savair* principles. In our view, however, the record fails to support that assertion.

At the hearing, only two witnesses testified with respect to Reed's solicitation. Taken in isolation, the testimony of employee Hasegawa, paraphrasing Reed's remarks, attributes to him statements on the subject which appear ambiguous.

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[21] We find no merit in Respondent's contention that the Regional Director's Decision and Direction of Election in Case 37—RC—2245 found that Schubach, as an individual, should be included in the bargaining unit. It is clear from the context of that decision, that the Regional Director only found that the position held by Schubach at the time of the representation hearing, that of inventory control clerk, was a plant clerical position and, therefore, properly includable in the warehouse bargaining unit. No issue as to her temporary or permanent status was either raised or discussed.

However, we find more convincing Reed's clarifying and uncontradicted testimony that he told the card signers that: "all employees, before the contracted is signed, will pay no initiation fee" and "nobody is going to pay any initiation fee until a contract is signed, and all new employees that is hired after the contract is signed between the union and the company will be paying initiation fees."[22] Accordingly, we find that the record establishes that prospective card signers were not told that initiation fees would only be waived for those who signed.

In view of the above, we find that Respondent employed nine employees in the appropriate bargaining unit on May 11, the date of the Union's demand for recognition — five of whom had signed authorization cards. Their cards were identified and authenticated by the employees themselves, by the union representative who soli cited their signatures, or by fellow employees who were present when the cards were signed. Further, it is clear from the testimony that the employees were told that the cards would be used to request the Union's recognition and, if that failed, for an election. At no time were the employees told that the cards would be used solely for an election. Considering these circumstances, we conclude that, as of May 11, a majority of employees in the appropriate unit had validly selected the Union as their bargaining representative.

As previously stated, the General Counsel contends that under the principles set forth in *Gissel Packing Company, supra*, a bargaining order remedy should be granted in this

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[21] The Administrative Law Judge made no findings or credibility determinations relative to this issue. However, with respect to other issues on which there were testimonial conflicts, Reed's testimony was found to be the more reliable and, accordingly, was specifically credited. Conversely, in one instance where Hasegawa's testimony differed from that of another witness, the Administrative Law Judge found Hasegawa's testimony to reflect confusion and, accordingly, specifically credited the account given by the other witness.

case. We agree, as the unfair labor practice committed by Respondent was so pervasive and extensive that the possibility of erasing its effects on the employees and insuring a fair election by the use of traditional remedies is slight. And, therefore employee sentiment, as expressed by authorization cards, is best protected by a bargaining order.

Under the *Gissel* doctrine, a bargaining order becomes appropriate where a union's majority is established by cards and the nature and extent of the employer's unfair labor practices appear to make a free choice by the employees problematical. Here, there was but a single unfair labor practice, but it encompassed a massive wage increase whose scope and timing were clearly designed to undermine the Union's majority status. The following statement from *Tower Enterprises, Inc.,d/b/a Tower Records,* 182 NLRB 382, 387 (1970), enfd. 79 LRRM 2736, 67 LC Para. 12,453 (9th Cir. January 21, 1972), is directly applicable to the facts herein:

> It is a fair assumption that in most instances where employees designate a union as their representative, a major consideration centers on the hope that such representative may be successful in negotiating wage increases. Certainly this appears to have been an important consideration in the instant case. A unilateral award of a wage increase by an employer following a union's demand for recog nition results in giving the employees a significant element of what they were seeking through union representation. It is difficult to conceive of conduct more likely to convince employees that with an important part of what they were seeking in hand union representation might no longer be needed. An employer may have the right to persuade the employees that representation is not in their best interests, but it does not have the right to threaten them or confer benefits on them which are designed to influence the employees against choosing a representative. When, as here, an employer does so, free choice in a subsequent election becomes a matter of speculation, so long as the effects of the interference remain unremedied.

In its defense, Respondent asserts that, rather than being motivated by a desire to undermine the Union, its grant of wage increases was intended merely to fulfill the promises it had made its employees prior to the commencement of the Union's campaign; and that it was fearful, because of its earlier promises. that the withholding of wage increases might also be judged unlawful. We find no merit in these assertions, for the unspecified increases promised four or five employees in April were clearly intended to be step increases — most probably within the 4- to 8-percent range of the previous increases granted 6 months earlier. Instead, Respondent combined the expected step increases with a massive upward revision in the basic wage structure which yielded most employees total wage raises ranging from 36 to 48 percent. Further, while Respondent's parent corporation, Zale, had a policy which, on paper, mandated the payment of prevailing area wages, the record evidence establishes that such policy was not systematically implemented and no precedent was shown for any upward revision of the entire wage scale approaching the magnitude of the one effectuated herein.

We are similarly unimpressed with Respondent's attempt to give ameliorating weight to the fact that it refrained from telling its employees that the wage increases were related to the Union's campaign. On May 24, Landa, Zale's labor counsel, came from Dallas to Honolulu where he spoke to employees concerning the Union's representation petition. Four days later, the entire wage structure was raised between 33 and 40 percent. The fact that other company officials, not Landa, informed employees of the good news would not, in our view, prevent them from getting the message that the increase was Respondent's response to the Union's efforts. Further, we note that, when Landa initially spoke on union-related matters at an employee meeting on his first day in Honolulu, one of the principal questions asked of him was what basis was used in determining the wage scale. Landa's answer referred to "competitive" rates, which he then proceeded to implement in the next few days.

In *Skaggs Drug Centers, Inc.*, 197 NLRB 1240 (1972), enfd. 84 LRRM 2384, 72 LC Para. 13,951 (9th Cir. August 13, 1973), we granted a bargaining order where the only unfair labor practice found was a general pay increase which, while substantial, was of considerably more modest degree than the one implemented herein. There, we fully explicated our reasons for finding our traditional remedies to be insufficient for the purpose of adequately remedying this type of unlawful employer activity. The identical considerations are applicable herein.

Accordingly, we find that by refusing the bargaining request of the Union which represented a majority of its employees in an appropriate unit and, thereafter, granting wage increases under the circumstances described above, Respondent violated Section 8(a)(5) and (1) of the Act, and that a bargaining order is necessary and appropriate to protect the majority sentiment expressed through authorization cards and to otherwise remedy the violation committed. We further find that under the principles set forth in *Trading Port, Inc.*, 219 NLRB 298 (1975), and *The Kroger Co.*, 228 NLRB 149 (1977), Respondent had a duty to bargain with the Union as of May 28, 1976, the date on which Respondent committed its unfair labor practice which undermined the Union's majority status and made the holding of a fair election improbable.[23]

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[23] Member Truesdale would date the bargaining order from May 11, 1976, the date on which the Union, with a card majority, requested recognition and bargaining, which request Respondent declined. *Chandler Motors, Inc.*, 236 NLRB No. 186 (1978).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By interfering with, restraining, and coercing its employees in the exercise of rights guaranteed by Section 7 of the Act, as found above, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, we shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes and policies of the Act.

Having found that Respondent unlawfully refused to bargain with the Union as the exclusive representative of its employees in an appropriate unit, we shall order it, upon request, to bargain collectively with the Union and, in the event an understanding is reached, embody such understanding in a signed agreement.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Honolulu Sporting Goods Co., Ltd., a subsidiary of Zale Corporation, Honolulu, Hawaii, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Granting wage increases to its employees for the purpose of influencing their selection of a labor organization as

their bargaining representative; provided, however, that nothing herein shall be construed as requiring Respondent to vary or abandon any benefits heretofore established.

(b) Refusing to bargain with the Union as the exclusive representative of a majority of its employees in the below described bargaining unit, found appropriate under Section 9(b) of the Act: All full-time and regular part-time warehousemen and truckdrivers employed by Respondent at its facility located at 2868 Kaihikapu Street, Honolulu, Hawaii; excluding office clerical employees, guards and supervisors as defined in the Act.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Upon request, recognize and bargain with the Union as the exclusive bargaining representative of the employees in the above-described appropriate unit and, if an understanding is reached, embody such agreement in a written signed contract.

(b) Post at its warehouse facility in Honolulu, Hawaii, copies of the attached notice marked "Appendix."[24] Copies of said notice, on forms provided by the Regional Director for Region 20, after being duly signed by a representative of Respondent, shall be posted immediately upon receipt thereof, and shall be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where

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[24] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D.C. January 15, 1979

John A. Pennello
Member

Betty Southard Murphy
Member

John C. Truesdale
Member

NATIONAL LABOR
RELATIONS BOARD

(SEAL)

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board An Agency of the United States Government

WE WILL NOT grant our employees wage increases for the purpose of influencing their choice of a labor organization as their bargaining representative.

WE WILL NOT refuse to bargain with Hawaii Teamsters and Allied Workers, Local 996, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of our employees in the appropriate unit noted below, with respect to rates of pay, wages, hours, or any other terms or conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of any rights guaranteed to them by the National Labor Relations Act, as amended.

WE WILL, upon request, bargain collectively with the said Local 996, as the exclusive representative of our employees in the appropriate unit noted below, with respect to rates of pay, wages, hours, and all other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The appropriate unit is:

> All full-time and regular part-time warehousemen and truckdrivers employed by us at our warehouse facility located at 2868 Kaihikapu Street, Honolulu, Hawaii; excluding office clerical employees, guards and supervisors as defined in the Act.

All our employees are free to become, remain, or refrain from becoming or remaining members of the above-named or any other labor organization.

HONOLULU SPORTING GOODS CO., LTD., A SUBSIDIARY OF ZALE CORPORATION

Employer

By _____
Representative *Title*

Dated _____

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be dircted to the Board's Office, Federal Building, Room 13018, 450 Golden Gate Avenue, San Francisco, California 94102, Telephone 415-556-0335.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

Case No. 37-1273

HONOLULU SPORTING GOODS CO., LTD.,
A SUBSIDIARY OF ZALE CORPORATION

AND

HAWAII TEAMSTERS AND ALLIED WORKERS, LOCAL 996, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Miss Eileen H. Hamamura, Honolulu, Hawaii, for General Counsel.

Messrs. Jared H. Jossem, Honolulu, Hawaii, and *Norman Landa,* Dallas, Tex., for Respondent.

Van Bourg, Allen, Weinberg and Roger, by *Mr. David Rosenfeld,* San Francisco, Calif., for Complainant Union.

DECISION

Statement of the Case

MAURICE M. MILLER, Administrative Law Judge: Upon a charge filed July 22, 1976 and duly served, the General Counsel of the National Labor Relations Board caused a Complaint and Notice of Hearing dated November 29, 1976 to be issued and served upon Honolulu Sporting Goods Co., Ltd., designated as Respondent or Honsport within this decision. Therein, Respondent was charged with the commission of unfair labor practices within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act. 61 Stat. 136, 73 Stat. 519. Respondent's answer, duly filed, conceded certain factual allegations within General Counsel's complaint, but denied the commission of any unfair labor practice.

Pursuant to notice, a hearing with respect to this matter was held on February 22nd and 23rd, 1977 in Honolulu,

Hawaii before me. The General Counsel and Respondent were represented by counsel. When the hearing began, General Counsel's representative moved to amend certain jurisdictional allegations within her complaint; Respondent's counsel, thereupon, conceded the correctness of particular allegations which the permitted amendment had modified. Each party was, thereafter, afforded a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence with respect to pertinent matters. Since the hearing's close, briefs have been received from General Counsel's representative and Respondent's counsel; these briefs have been duly considered.

FINDINGS OF FACT

Upon the entire testimonial record, documentary evidence received, and my observation of the witnesses, I make the following findings of fact:

I. Jurisdiction

Respondent raises no question, herein, with respect to General Counsel's present jurisdictional claims. Upon the Complaint's relevant factual declarations — more particularly, those set forth in detail within the lately amended second paragraph thereof — which Respondent's counsel currently concedes to be correct, and upon which I rely, I have concluded that Respondent herein was, throughout the period with which this case is concerned, and remains, an employer within the meaning of Section 2(2) of the Act, engaged in commerce and business activities which affect commerce within the meaning of Section 2(6) and (7) of the statute. Further, with due regard for presently applicable jurisdictional standards, I find assertion of the Board's jurisdiction in this case warranted and necessary to effectuate statutory objectives.

II. Complainant Union

Hawaii Teamsters and Allied Workers, Local 996, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, designated as Complainant Union within this decision, is a labor organization within the meaning of Section 2(5) of the Act, as amended, which admits certain of Respondent's employees to membership.

III. The Unfair Labor Practice Charged

Issues A.

This case presents two closely-related substantive questions, both of which have been thoroughly litigated. For present purposes, these questions may be summarized, generally, as follows:

1. Whether Respondent's management representatives granted Honolulu warehouse workers and their firm's truckdriver substantial wage increases consistently with a revised wage progression schedule bottomed upon job tenure — despite the firm's receipt of prior notification that Complainant Union had petitioned this Board for certification as such workers' collective bargaining representative — for the purpose of forestalling the designation of Complainant Union, by such workers, as their representative.

2. If so, whether Respondent should be directed to recognize and bargain collectively with Complainant Union herein — retroactively from the date when the challenged wage increases were granted — bottomed upon that organization's prior procurement of designation cards signed by a majority of Respondent's workers within a warehouse and truckdriver unit concededly appropriate for collective bargaining purposes.

With respect to General Counsel's first contention, Respondent concedes that various challenged wage increases were

granted, but seeks a determination that such wage increases had been previously promised, and would have been granted consistently with Respondent's commitment and previously-followed practice, without regard for the pendency of Complainant Union's representation petition. Further, Respondent contends that General Counsel's presentation provides no persuasive support for Complainant Union's majority representation claim; that Complainant Union had never formally requested recognition; that, consequentially, Respondent's management representatives have never specifically refused to recognize Complainant Union herein; and that Respondent's management, therefore, should neither be directed nor required to bargain collectively with the labor organization designated.

B. Facts

1. Background

a. Respondent's Business

Honolulu Sporting Goods Company, Ltd., a Hawaii corporation, is engaged in the retail and wholesale distribution of sporting goods, equipment and related items. Since 1972, approximately, the firm has been a Zale Corporation subsidiary.

Zale Corporation maintains substantially diversified retail merchandising establishments throughout the United States, Puerto Rico, Guam, and England. The firm's retail operations are conducted through merchandising groups, each of them headed by a group vice president. Within each merchandising group, Zale maintains operating divisions, each with its own president and staff; these management representatives are charged with responsibility for divisional operations, subject to defined company policies and procedures. Throughout the period with which this case is concerned, Zale Corporation maintained some seventeen divisions. Among these, the firm's Sporting Goods Division maintained and operated

more than thirty sporting goods stores, which provided a full line of sporting goods and other leisure-time products. Honolulu Sporting Goods Company, Ltd., functioning within its parent corporation's Sporting Goods Division, currently maintains four retail stores within the State of Hawaii; two are located on Oahu, one on Maui, and one in Hilo. The firm, likewise, maintains a wholesale "team sales" office, located within its Honolulu warehouse facility.

For present purposes, we are concerned, solely, with certain developments, during the late spring months of calendar year 1976 specifically, which concerned Respondent's Honolulu warehouse personnel.

b. Managerial Personnel

Throughout the period with which this case is concerned, Zale Corporation's group vice president, Marvin Rubin, held managerial responsibility, *inter alia,* for both the firm's Sporting Goods and Jewelry divisions. Between 1974 and March, 1976, Vernor Zinik, president of Zale Corporation's Sporting Goods Division, functioned as Rubin's direct subordinate. William Gart, the Division's vice president in charge of operations, reported to Zinik, in Zale Corporation's managerial chain of command.

Within the corporation's Sporting Goods Division, throughout the period with which this case is concerned, Miles Baidack, Honsport's regional supervisor, functioned as Respondent's general manager. Between his November, 1974 designation and March 1, 1976 Baidack reported directly to Zinik, Zale Corporation's divisional president. Lawrence Yamaguchi functioned as Baidack's assistant; he was considered primarily responsible for Honsport's retail store operations. Alvin Moratin, Senior was, throughout the period with which this case is concerned, Honsport's warehouse manager.

c. Respondent's Performance Review and Pay Raise Policy

With respect to wages and salaries, Zale Corporation's policy and procedure manual provides, generally, for the payment of competitive wages based on area wage surveys. The manual mandates a systematic pay program, with pay ranges for each job based on the rates paid for similar positions within the local community. In this connection, the manual declares that: —

> Surveys are conducted in various geographic areas to determine the proper pay range for the [relevant labor] grades. The pay ranges will vary throughout the country depending on the prevailing pay scale in the local area (bracketed language supplied for clarity).

Zale Corporation's manual, further, requires performance reviews for employees, which their supervisors must conduct, periodically. The precise calendar "intervals" between performance reviews may vary within the divisions; corporate policy, however, dictates such formal reviews at least once per year. Should a given worker's performance be deemed sufficient to qualify him or her for a pay increase, supervisors are directed to make recommendations to management, consistently with their determinations.

Pursuant to Zale Corporation's policy mandate, Honsport's management representatives, Baidack and Yamaguchi, had — shortly before the period with which this case is concerned — formulated pay scales for their firm's warehouse personnel. The pay scales, with a designated October 1, 1975 effective date, had been separately drafted for warehousemen, on the one hand, and for Respondent's warehouse clerks and truckdriver, on the other. For warehousemen, Respondent's management had set a $2.40 per hour starting rate, which matched the State of Hawaii statutory minimum rate; nine hourly rate increments, rising to $3.70 per hour after "51" months of full-time service, had been established. The first step, which provided for a .15 raise

following completion of the warehouseman's three month probationary period, was to be "automatically" granted; further raises at six-month intervals were to be based upon merit, with set increments for personnel who might be considered worthy, pursuant to Respondent's six-month performance reviews.

> (These reviews were to be conducted on April 1st and October 1st, yearly. Employees with six months of service following their last previous raise could, thereby, qualify for a further raise, within the rate range previously noted.)

With respect to Respondent's head shipping clerk,head receiving clerk, and truckdriver, Baidack and Yamaguchi had set a $2.60 hourly rate payable after three months, with ten raises within the range possible at six-month intervals thereafter; the maximum $4.10 hourly rate was to be payable after "63" months of full time service. All raises, within this rate range, were to be merit raises.

While a witness, Baidack conceded that, when his firm's October 1, 1975 warehouse pay scale was formulated, he had "combined" a rate structure which had been developed, several months previously, for Zale Corporation's Dallas, Texas warehouse personnel, with a rate structure which Warehouse Manager Alvin Moratin, Senior had provided. So far as the record shows, however, Respondent's October, 1975 pay scale formulations had not been derived from surveys calculated to determine prevailing pay scales for warehouse personnel, specifically within Honolulu, Hawaii's labor market.

d. Zale Corporation's Managerial Reorganization

On March 1, 1976 Jerrold Blumenthal replaced Vernor Zinik as Zale Corporation's Sporting Goods Division president. Concurrently, certain changes were effectuated with respect to divisional line supervision; *inter alia* Respondent's general manager, who had previously reported to Divisional

President Zinik directly, was notified that he would be immediately responsible to William Gart, the division's vice president.

e. Zale Corporation's Management Representatives Visit Respondent

Between March 8th and March 14, 1976 President Blumenthal and Vice President Gart visited Hawaii, where they reviewed Honsport's situation. They visited Respondent's stores and conferred extensively with General Manager Baidack and Respondent's subordinate managerial personnel. The subjects canvassed compassed regional operations, personnel, compensation levels, performance reviews, and merchandise problems.

During their first conversation — so Gart credibly testified — Respondent's general manager reported that he had not yet conducted his scheduled semi-yearly performance reviews. His divisional supervisor directed him to review Respondent's personnel promptly; further, Baidack was directed to forward his reviews, plus Zale Corporation's "Form 515's" containing his recommendations with respect to raises, so that Respondent's parent corporation could take proper steps in that regard.

> (Vice President Gart, so his credible testimony shows, had — some time previously, following his 1973 designation presumably — decreed a divisional policy whereby workers would be reviewed twice yearly in *March* and *September*, so that recommended pay changes could be effectuated during *April* and *October* pay periods. When he learned that General Manager Baidack had scheduled April and October performance reviews, Gart directed him to "get on to the division schedulei65 forthwith, and to transmit his performance reviews and Form 515's thereafter.)

Respondent's general manager was directed, *inter alia*, to put Honsport's retail store sales personnel on commission. So far as the record shows, however, Respondent's October, 1975

rate ranges for Honolulu warehouse personnel were never specifically discussed.

Before their Hawaii visit concluded, Blumenthal and Gart notified Respondent's general manager that his future performance would be scrutinized closely, and that he should "shape up" forthwith, failing which he might find his future with the Company jeopardized.

On March 25th, following his return to Dallas, Vice President Gart prepared a comprehensive eleven page memorandum, directed to both Baidack and Yamaguchi; therein, he detailed various merchandising and managerial "problem areas" which, within his view, required consideration and correction. With respect to Respondent's Honolulu warehouse, Baidack was directed to make certain physical changes, and to modify certain merchandise storage, handling and security procedures. No comments were proffered, however, with regard to warehouse personnel compensation levels.

f. Respondent's Performance Review and Pay Raise Recommendations

On April 10th, Respondent's warehouse manager conducted some performance reviews which covered four of Respondent's five warehousemen, together with Honsport's single truckdriver. These reviews, however, did not cover Respondent's complete warehouse complement.

(Those reviewed were Warehousemen Hasegawa, Leomo, Ragasa, and Yamamoto, plus Truckdriver Takahara. The firm's fifth warehouseman, Timothy Culkin, had been hired for regular part-time work less than a month previously; he had not yet completed his probationary period. Honsport's two warehouse clericals, likewise, were not reviewed. Carol James, the firm's inventory control clerk, was, presumably, then on maternity leave. However, no rationale for Moratin, Senior's failure to review Alvin Moratin, Junior, then Honsport's freight claims clerk, has been proffered for the present record.)

Moratin, Senior's reviews were, promptly, submitted to Respondent's general manager. Thereupon, I find, Baidack prepared Form 515's which — presumably — reflected his pay raise recommendations for Respondent's warehouse personnel. Meanwhile, however, Honsport's warehouse manager, following his April 10th performance reviews, had promised his warehouse subordinates wage increases; Moratin, Senior had cited no specific raise figures.

Within a short time after April 10th, Respondent's general manager transmitted Form 515's for Honsport's warehouse personnel to Vice President Gart; however, these "Employee Status Record Forms" were transmitted without their supportive performance reviews.

g. Zale Corporation's Reaction

While a witness, Vice President Gart testified — without effective contradiction — that Baidack's Form 515's, submitted for Respondent's warehouse personnel, were returned to Honolulu by mail — on or about Thursday, April 15th — with his personal, handwritten note declaring that Respondent's general manager had recommended "inadequate" warehouse raises, within his view.

(The Sporting Goods Division vice president, concededly, kept no copy of his covering note. His failure, in this respect, reflected a deviation from his regular practice. When Baidack's Honsport files were reviewed, subsequently, Gart's handwritten note could not be found. Arguably, Respondent's failure to produce such documentation, supportive of Gart's testimony, might warrant some present doubt regarding that testimony's probative weight. The record, however, reflects no forthright or credible denial, proffered by Baidack, that his submitted Form 515's, for warehouse personnel particularly, had, indeed, been returned. He conceded, while a witness that he had subsequently asked Controller Martin why his recommendations had been rejected. Upon this record, Vice President Gart's testimony, generally,

impressed me favorably; his proffered recollections, in this regard, have therefore been credited.)

Within a memorandum dated April 30th, Baidack finally replied to Vice President Gart's previously forwarded March 25th communication. With respect to his superior's directives and suggestions, related to Honsport's warehouse specifically, Respondent's general manager reported that "all changes designated in the warehouse" were currently in process. Regarding two matters which Zale Corporation's vice president had discussed, specific replies were proffered; Baidack's memorandum, however, made no reference to compensation recommendations for warehouse personnel.

On May 10th, approximately, Jerry Martin, Zale Corporation's Sporting Goods Division vice president and controller, left Dallas, Texas for Hawaii. The record, herein, provides no comprehensive recapitulation with regard to his visit's purpose; Respondent's testimonial and documentary presentation, however, warrants a determination — which I make — that among other things, Martin hand-carried "some 515's" which Baidack had previously submitted.

Within a subsequent May 12th memorandum, directed to Baidack, Gart complained that — despite the April 30th memorandum which Respondent's general manager had sent him — he still lacked "information" with regard to certain questions raised during his [Gart's] March visit and subsequent March 25th communication. *Inter alia*, the Sporting Goods Division's vice president noted that "some 515's" had been returned, through Vice President and Controller Martin, because he [Gart] did not understand them. The record, however, warrants a determination — which I make — that Gart's questions were specifically related to Baidack's proposed compensation adjustments for assistant managers and department heads. The vice president's May 12th memorandum made no reference to Honsport's proposed warehouse compensation changes.

2. Complainant Union's Representation Petition

a. Complainant Union's Contact with Respondent's Workers

Shortly before these several company developments, some time on Thursday, May 6, 1976, Business Agent Harland Reed of Complainant Union had spoken with several Honsport warehouse workers. While conversing with Union members within a nearby completely unrelated facility, whom Complainant Union represented, Reed had been notified that Respondent's warehouse personnel lacked a collective bargaining representative. He had, thereupon, visited Respondent's warehouse, where he had conferred, briefly, with several workers. Reed had distributed Union designation cards, and had suggested a further meeting, at 4:00 o'clock that same day, within a nearby drive-in restaurant.

Four Honsport warehousemen met with Complainant Union's business representative, pursuant to his suggestion, following the conclusion of their May 6th working day. Reed discussed Complainant Union; detailed some Union benefits; and described his organization's designation card. He declared that — should a sufficient number of cards be signed — he would request Complainant Union's recognition, but that a representation election would "probably" be necessary.

> (*Inter alia*, Reed directed Respondent's warehousemen to disregard his designation card's reverse side; thereon, language whereby a different — though related — labor organization would, purportedly, have likewise been "authorized" to represent card signers had, mistakenly, been printed.)

Further, so the record shows, Reed discussed Complainant Union's initiation fees. Warehouseman Hasegawa testified that Complainant Union's business representative had declared, with respect thereto, that "if we [Respondent's warehouse workers] turned the company union" initiation fee payments would be waived, and that "after the company

turned union" anybody else would be required to pay. Reed, when queried further by General Counsel's representative, testified as follows: —

> Initiation fee? I told them that nobody pays initiation fees if we go through the — if they don't recognize us, we go through an election and we win, we start to negotiate for them, and nobody is going to pay any initiation fee until a contract is signed, and all new employees that is hired after the contract is signed between the union and the company will be paying initiation fees. I also told them, "Because you are the ones who wanted this union in there, in here, that's why the union don't charge you initiation fee."

During this meeting, three warehousemen — Hasegawa, Yamamoto, and Ragasa — completed, signed and dated Union designation cards. Warehouseman Leomo had already partially completed and signed his card, but added the date, plus his job classification, during their drive-in restaurant discussion. Complainant Union's business representative, then, collected four completed cards.

b. Complainant Union's Petition Filed

Shortly after noon on Monday, May 10th, Reed filed a representation petition [Case No. 37-RC-2245] with this Board's Sub-Regional Office; therein, Complainant Union sought certification within a bargaining unit defined to compass "regular full time and part time truckdrivers and warehousemen" within Respondent's Honolulu warehouse, save for "office" clericals and certain conventionally excluded classifications. Complainant Union described its petition as constituting its request for recognition, within the bargaining unit previously defined.

Respondent's warehouse personnel, following the completion of their May 10th shift, met with Complainant Union's business representative, for a further discussion, within Jumbo's Drive-In restaurant. The record warrants a determination, which I make, that the firm's fifth "regular part

time'' warehouseman, Timothy Culkin, was present. Following a brief discussion — during which Complainant Union's business representative substantially recapitulated his May 6th remarks regarding a designation card' significance — Culkin, I find, signed a card.

(Respondent's counsel, when he cross-examined Reed and Hasegawa particularly, sought to impugn their testimony that Culkin had, indeed, signed and delivered his designation card on May 10th, correctly dated. Since Complainant Union's business representative never submitted Culkin's card to this Board's Sub-Regional Office representative before their next subsequent contact four months later, the card in question could — conceivably — have been completed, signed and back-dated, shortly before its September 10th submission. When requested to report what Culkin looked like, Reed provided a generalized, somewhat questionable description, with respect to which Hasegawa's witness-chair recollection varied. Considered in totality, however, the record does warrant a determination — which I make — that Culkin signed a May 10th designation card. Reed's explanatory testimony — that Culkin's card had been retained within his ''organizing'' file at Complainant Union's headquarters because the representation petition which it would have supported had already been filed; because that petition, when filed, had been supported with four designation cards which he [Reed] considered, then, sufficient to demonstrate the organization's majority representative status; and because he believed, therefore, that no further ''showing of interest'' would be required — rings true. General Counsel and Complainant Union cannot be faulted for their failure to provide Culkin's *corroborative* testimony. Rather, I note Respondent counsel's failure to produce testimony from Culkin, presumably a readily available witness, calculated to *contradict* Reed's proffered recollection and documentary submission.)

Following his receipt of Culkin's signed card, Complainant Union's business representative, so I find, cautioned Honsport's warehousemen that they should "watch out" for company questions and maneuvers calculated to subvert their presumptive desire for Union representation. Upon this note, the meeting concluded.

Sometime subsequently, I find, Complainant Union's business representative telephoned Baidack; Respondent's general manager was notified that Complainant Union's representation petition had been filed. Reed's testimony, with regard to their further conversation, which I credit in this connection, warrants a determination — which I make — that Complainant Union's spokesman claimed to represent a majority of Honsport's warehouse workers; Respondent's recognition of Complainant Union was requested.

> (Reed's proffered recollection, particularly with regard to this telephone conversation with Respondent's general manager, was — within my view — sufficiently positive. He testified that he communicated with Baidack shortly following a fruitless personal visit to Respondent's premises, either during the mid-afternoon of May 10th, or sometime during the morning of Tuesday, May 11th. While a witness, Baidack could not, himself, recall the date on which Complainant Union's business representative telephoned, precisely; nor could he "recall" whether Complainant Union's recognition had been requested. Upon this record, Reed's testimony, within my view merits credence.)

In material part, Respondent's general manager notified Reed that, when Respondent received its copy of Complainant Union's representation petition, that document would be referred to Zale Corporation's management representatives, for whatever response they might consider necessary.

c. Respondent's Notification Given to Zale Corporation's Management

Respondent's general manager, testifying consistently with his best recollection, recalled that Honsport received its formal notice with respect to Complainant Union's petition two days after Business Agent Reed's telephone call — thus, on Thursday, May 13th, presumably. Thereupon, with a telex message, he promptly notified his Zale Corporation superiors.

> (Previously, within this decision, reference has been made to Zale Corporation's Sporting Goods Division controller, Jerry Martin, who — so the record shows — had reached Hawaii several days previously. The present record is silent with respect to any communication between Martin and Respondent's general manager regarding Reed's telephone call or Complainant Union's petition.)

On Friday, May 14th, Vice President Gart placed a conference call to Respondent's general manager, with President Blumenthal of Zale Corporation's Sporting Goods Division and Norman Landa, Zale Corporation's assistant general counsel for labor relations, participating.

Inter alia, Baidack was queried with regard to when he had first heard about Complainant Union's petition; further, he was asked why he had not telephoned Vice President Gart, promptly. Respondent's general manager replied — so Gart's credible testimony shows — that he had not considered the matter "important" before he received the Board Sub-Regional Office's official document. Baidack was notified that Assistant General Counsel Landa would visit Honolulu shortly. He was directed to refrain from questioning Honsport's workers, and to take no action, whatsoever, which might "create problems" while "sitting tight" pending Landa's arrival.

3. Respondent's Reaction to Complainant Union's Petition

a. Norman Landa Visits Hawaii

On Sunday, May 23rd, Landa, pursuant to Vice President Gart's prior suggestion plus President Blumenthal's confirmatory directive, reached Honolulu; he brought with him, from Zale Corporation's Dallas headquarters — so I find — some wage rate data supplied by the corporation's home office wage and salary administrator, which purportedly reflected wage rate ranges currently being utilized for warehouse workers by Sears, Roebuck & Company and J.C. Penney Company, Inc. within their Honolulu facilities.

> (The record, herein, warrants a determination — which I make — that various management representatives, within Zale Corporation's several divisions, have, historically, solicited such wage rate data from their particular area's competitive firms. Pay schedules for divisional personnel — bottomed upon such solicited date — have periodically, been drafted and revised conformably with a company policy which calls for the payment of so-called "competitive rates" within a particular facility's relevant labor market.)

The wage data which Assistant General Counsel Landa had procured, *a priori,* from his Dallas, Texas source, however — with particular reference to Sears and Penney's Honolulu warehouse rate ranges — had reflected merely their entry-level and maximum pay rates. The record warrants a determination, which I make, that Landa expected to procure further, more detailed, data.

During a May 24th Monday morning conversation with Baidack, Landa discussed the situation which Complainant Union's representation petition had generated. He declared his concern because Honsport's warehouse personnel had been promised wages — during the course of their prior April performanance reviews — which had not yet been granted. Hav-

ing reviewed Respondent's various pay scales currently in force — for sales people as well as warehouse workers — Landa declared his view, *inter alia,* that Honsport's warehouse personnel were underpaid; he suggested a current wage survey. Zale's assistant general counsel named certain persons, connected with several local business operations, with whom he proposed to communicate; Baidack was requested to provide further names — specifically, personnel directors connected with other local businesses which maintained warehouse facilities.

With particular reference to Complainant Union's representation petition, Baidack testified that Landa had declared — during that conversation — his belief that Respondent would not "lose this case" which Complainant Union has brought. Further, Baidack recalled a comment by Zale's assistant general counsel that "in all likelihood we would commit unfair labor practices" while winning the case.

(When General Counsel's representative first sought to question Baidack, with regard to Landa's May 24th remarks, Respondent's counsel noted a protest in his client's behalf, contending that Assistant General Counsel Landa's statements constituted confidential communications between Zale Corporation's lawyer and Respondent's general manager, with respect to which Respondent could — now — properly claim privilege. General Counsel contended that no privilege could be claimed since Landa's remarks had been closely related to Respondent's developing plan for the commission of unfair labor practices. Respondent's claim of privilege was denied. *Federal Rules of Evidence,* Rule 501. Upon reconsideration, my ruling is reaffirmed. Regardless of my determination's correctness, however, I note — further — that Respondent's counsel subsequently proffered Landa's testimony, both with respect to this May 24th conversation and with regard to relevant developments thereafter. Thereby, clearly, Respondent's claim of privilege — whether or not meritorious — was consciously waived.)

Then, so Baidack testified. Landa provided him with a booklet which described contrasting statements and conduct considered permissible and/or proscribed, for management representatives concerned with union representation campaigns. Respondent's general manager was told to comply with the booklet's directives. When queried further, with regard to Landa's precautionary remarks, Baidack recalled statements:

> . . . that we could not talk directly to the people pro or con on the union; we could only state the case of the company and list the benefits that the employees derived working for the Zale Corporation. More points along those lines . . . He gave me the Zale Corporation booklet on how to deal with labor unions which have all the do's and don'ts in it. . . .

Landa, when subsequently summoned as Respondent's witness, conceded a conversational "unfair labor practice" reference, but denied making any comment that Respondent, confronted with Complainant Union's petition, would transgress permissible limits. When requested to detail his May 24th conversation with Baidack, Landa testified as follows:

> We were talking about giving the increases, and I told him that again, that we were between a rock and a hard place; that if we gave the increases we could face possible unfair labor practice charges, and that if we didn't give them we could face unfair labor practice charges. . . .
>
> Q. And[do] you recall what, if anything, Mr. Baidack said in response? A. Shrugged his shoulders.
>
> Q. Did you tell Mr. Baidack, "We're going to commit unfair labor practices?" A. I did not.
>
> * * *
>
> Q. During your conversation with Mr. Baidack, did you give him any reference materials with respect to do's and don'ts? A. Yes, I did.

> Q. And did you give him any advice with respect to what he should not do in dealing with the employees? A. I did . . . That happened on the 24th, Monday, in Mr. Baidack's office. I told him and Mr. Moratin [Senior] that they could not promise the employees benefits or grant increases to dissuade them from going union; they could not threaten them with plant closing or make any other threats. They could not talk to the employees or ask questions concerning their union sympathies, and that they could not discriminate against them because of their union activities if they knew of them . . . I told them that if an employee wanted to talk to them voluntarily and freely, they could listen, but they could not draw the employee out. I told them that if the employees asked them any questions with regard to their personal feelings, that they could go ahead and comment as long as there was no promise or threat contained.

With matters in this posture, I am satisfied that Baidack's specific testimony, regarding Landa's conceded "unfair labor practice" comment reflects a misconstruction of that comment's purport and thrust. Possibly, Respondent's general manager may have misconstrued Landa's comment when it was made; possibly, however, his testimonial recapitulation really reflects a currently rationalized recollection derived from less-than-perfect memory, which subsequent developments may have colored. Whatever the situation, I am satisfied that Landa's proffered recollection, particularly with regard to their May 24th morning conversation, merits credence.

Between 9:00 and 10:00 o'clock, after his conversation with Respondent's general manager, Landa spoke to Honsport's warehouse workers. Following Baidack's introduction, Landa reported Complainant Union's petition; noted the possibility that a representation vote would be conducted; declared that a Board hearing would be held to determine who would vote and who would not vote; notified his listeners that they were free to vote for or against Union representa-

tion; and declared that the law protected them in their right to do so.

> (Warehousemen Yamamoto and Hasegawa, together with Respondent's general manager, were questioned with regard to this meeting. Their composite recollections with respect to what transpired, however, were limited. My factual determinations, herein, derive from Landa's comprehensive testimony.)

Before the meeting concluded, I find, Truckdriver Takahara questioned Landa with respect to how Respondent determined its compensation schedule for warehouse work. Zale's assistant general counsel replied — so I find — that the Company's policy was to pay "competitive rates" within the area where compensable work was being performed.

> (Originally, while a witness, Hasegawa recalled Takahara questioning Landa with regard to how he could compare Honsport's warehouse pay scale with "mainland" warehouse rates. He [Hasegawa] could not recall, however, how the subject had been raised; his recollection with regard to Landa's reply was not solicited. Upon this record. Landa's recollection, with respect to the matter, has been credited.)

Takahara, so Zale's assistant general counsel recalled, proferred no further comment. Upon this note, presumably, the meeting concluded.

Directly thereafter, Landa placed a long distance telephone call to Vice President Gart. The Lawyer's credible, corroborated testimony, with regard to the substance of his verbal report, reads as follows:

> I told Mr. Gart that I had arrived in Honolulu, that we met with the employees in a meeting that morning; that we had meetings, further meetings [set for] that afternoon with members of [Respondent's Honolulu] law firm; that based on what we had previously obtained from Penney's and Sears, that I thought that the wage rates we were paying in Honolulu were low, and that I

would get back to him (bracketed material interpolated to promote clarity).

The Sporting Goods Division's vice president requested Landa, merely, to keep him informed, with respect to further developments.

b. Respondent's New Wage Survey

Throughout the balance of Monday, May 24th, and the following day, Assistant General Counsel Landa, with Baidack's help, sought to determine prevailing rates of pay and rate ranges, within the Honolulu labor market, for warehouse personnel. *Inter alia*, they communicated with a Hawaii Employer's Council representative; they were provided with data which compassed certain "low, median and high" rates currently being paid truckdrivers and warehousemen by five designated retail establishments. Further, both men conferred face-to-face, with local personnel managers or directors for Sears, Woolworth's and J.C. Penney stores. With their survey completed, Baidack and Landa proceeded to formulate new rate ranges for Honsport's warehousemen, warehouse clerical workers and truckdriver.

c. Landa's Report to Zale Corporation's Management

Thereafter, on Wednesday, May 26th, Landa telephoned the Sporting Goods Division's vice president. When queried with regard to Landa's report, General Manager Baidack testified that Gart was told: —. . . [It] looked like we would have to grant a substantial increase to these [warehouse] personnel, and there was no way to get around it; that we were, in fact, underpaying according to equivalent jobs in the area; and that if we would stand any chance against the union, this would be the only way we could do that.

Further, Baidack testified that Landa supplied Gart with proposed "low" and "high" hourly rate figures for both of Respondent's required warehouse rate ranges, merely. He [Baidack] declared that Gart had not signified his concurrence

directly, but that he had — ultimately — communicated his "approval" during a subsequent May 27th or May 28th telephone conversation.

During cross-examination, however, Baidack could not recall, precisely, how many times Landa had telephoned his divisional superior. He speculated that "two to four" calls had been placed. He could not recall specific conversations, or specific phrases, conceding that he could merely recapitulate the "general content" of Landa's telephoned reports.

When summoned, later, in Respondent's behalf, Zale's assistant general counsel testified at length — with Vice President Gart's substantial corroboration — regarding these telephone calls. His proffered recollections read as follows.

> I told Mr. Gart that we had obtained the results of the Hawaii Employer Council survey; that along with the Penney's and Sears rates we had obtained, that I felt we were low. I made a recommendation that the wage rate be adjusted, and then I read off what I suggested or what I recommended to Mr. Gart. . . . Mr. Gart asked me if it would be competitive. I told him we would probably not be the highest paid warehouse in Honolulu, but we would be in the ballpark. He then asked me, "Are we going to have any problems with it?" I told him that we were really between a rock and a hard place. The employees had been previously reviewed, that they were expecting raises, and that if we did not give them raises, that there was a good possibility that unfair labor practice charges would be filed for not giving the raises. On the other hand, I told him that if we gave the raises, we could also face the possibility of unfair labor practice charges, but that in my opinion the risk of the latter was lesser than the risk of the former because it was within the company's policy of making the surveys, that the employees, themselves, had been told that they were free to vote either way that they wanted,and that no election was imminent. I also told him that because we had given the employees — The

> employees had been reviewed and had been promised wages, that that was also a factor; that it was my legal opinion that if we did we would not be committing an unfair labor practice . . . Mr. Gard asked me "Can we wait" I said "No. I would like a decision immediately" He replied, "Go ahead and make the change"

Confronted with patent discrepancies between Baidack's and Landa's proffered recollections, I find the assistant general counsel's testimonial recapitulation more worthy of credence, for several reasons. *First* I note Baidack's final concession-despite his purportedly positive direct testimony — that he could not recall Landa's specific language, but merely its general tenor.

> (When queried during General Counsel's redirect examination, with respect to whether Landa had said *anything* regarding a union, Baidack could merely recall the lawyer's comment that, "there was a good possibility the election would happen" with results which could not be gauged.)

Second: Vice President Gart's notes, taken during the conversation in question, reveal — despite Baidack's contrary recollection — that Landa had, then, presented him with two completely detailed rate ranges for Honsport's warehouse personnel, rather than with their minimum and maximum rates, merely. *Third:* I note that, some seven months before this case was heard — during July, 1976, specifically — Baidack had resigned his position as Honsport's regional supervisor. The record, considered in totality, warrants determinations — which I make — that Vice President Gart had long before his regional supervisor's resignation, strongly criticized the latter's performance record; that Baidack's subsequent dealings with Zale Corporation's management representatives, and some Honsport personnel, *following his resignation* had — temporarily, at least — been marred by tension; and that Respondent's former general manager had, for a time, considered himself seriously aggrieved thereby. Baidack's witness chair demeanor — which I have retrospectively evaluated with these

developments in mind — persuasively suggests that his testimonial recapitulations, wherever they differ from Landa's, may reflect his rationalized recollections, merely bottomed upon some memories which personal "afterthoughts" could have colored. Landa's version of his May 26th conversation with Vice President Gart merits credence, within my view.

d. Respondent's Contacts With Concerned Workers

Respondent's revised pay scales for warehouse personnel,with respect to which Vice President Gart had noted Zale's concurrence, provided substantial raises for Honsport's concerned workers. These changes should be noted.

With respect to warehousemen, Respondent's previously defined starting rates [$2.40/hour] was raised by $.90, becoming $3.30 per hour. For nine successive steps, set at six-month intervals thereafter, Respondent replaced successive $.15 hourly rate raises with a progressively graduated series of rate increments ranging from $.17 to $.24 per hour. The firm's new rate range maximum, payble after "51" months of full-time service, became $5.11; this represented a $1.41 increase, beyond the firm's previously defined $3.70 rate range maximum.

With respect to Honsport's warehouse clerks and truckdriver, comparative entry-level rates, derived from the firm's previously defined and revised rate ranges, have not been provided for the present record. For eleven successive steps, set at six-month intervals thereafter, however, Respondent replaced successive $.15 hourly rate raises with a progressively graduated series of rate increments ranging from $.18 to $.27 per hour. The rate payable after three months of service became $3.57; this represented a $.97 raise over the defined $2.60 hourly rate previously declared payable after Respondent's probationary period. Honsport's new rate range maximum, payable after "63" months of full-time service, became $5.75; this represented a $1.65 raise beyond the firm's previously defined $4.10 maximum hourly rate.

For Respondent's warehousemen, the various rate range modifications noted reflected prospectively payable gross hourly rate increases, varying from 33 percent to 38 percent of the firm's previously defined rate range steps. With respect to Honsport's warehouse clerks and truckdrivers, new step rates, which would range from 34 percent to 40 percent higher than comparable steps within the firm's previously defined rate range, were promulgated.

Having procured Gart's permission to raise warehouse compensation levels consistently with these newly formulated pay scales, Landa suggested that Respondent's general manager should meet with Honsport's warehouse personnel to describe their newly-formulated rate range structure. Pursuant to Landa's suggestion, Baidack drafted some notes, which would cover his prospective remarks. Then, on Friday, May 28th, Respondent's general manager summoned his firm's warehouse personnel. They were reminded that their performance records had been reviewed during April, 1976, and that they had "all" been recommended for merit raises. Baidack's listeners were told, further, that — when their April 10th performance reviews were conducted — the wage schedules for Honsport's warehouse were being reviewed at Zale Corporation's Dallas headquarters; Respondent's general manager commented that, while a revised wage rate structure had not been completed in timely fashion, their new rates would be made effective retroactively, with a May 1st date. Additionally, Respondent's warehouse workers were told that their new rate structure, based upon a survey of comparable jobs, would be competitive with wage rates payable for similar positions, within the State of Hawaii specifically.

No references to Complainant Union's pending representation petition, or some possible representation vote, were made, however, during the meeting now under consideration.

Summoned as General Counsel's witnesses, both Baidack and Warehouseman Hasegawa testified that — while Respondent's general manager had addressed the group — both Landa and Warehouse Manager Moratin had been present. While

testifying subsequently in Respondent's behalf, however, Zale Corporation's assistant general counsel declared, categorically, that he had deliberately refrained from attending this particular conference. When queried, then, with regard to his reason, Landa testified as follows

> I had previously spoken to the employees on Monday. We were talking about giving raises. I had spoken to them about the possibility of the union election, that they were free to vote either way they wanted to, and I didn't want to be there when they were discussing the raises because I did not want them to think the union had anything to do with it . . . I had told them on Monday about the union petition, that there was going to be a hearing to determine who would vote and who would not vote. At that time I told them that they were free to vote for [the] union or against the union, but the law protected them in their rights to do so, and I did not want to be present at the time the raises were announced because of my previous meeting with the employees.

Baidack's testimonial reference to Landa's presence, during this May 28th meeting, struck me as purely perfunctory; his recapitulation, with respect to what was said, reflects no comments chargeable to Zale's assistant general counsel. And Hasegawa's testimony — particularly with regard to Takahara's question and Landa's purported reply — reflects some possible confusion, on his part, between what transpired during Respondent's May 24th meeting and May 28th developments. Landa's testimonial denial that he was present on May 28th, within my view, merits credence.

Directly following their May 28th meeting, Warehouse Manager Moratin told Honsport's warehouse workers — separately — what their new wage rates would be, based upon Respondent's wage survey, the firm's newly formulated rate ranges, and their respective periods of service. Warehouseman Yamamoto, Respondent's sole worker questioned in this connection, could not recall any reference to Complainant Union, by Moratin, Senior, while he [Yamamoto] was being notified regarding his raise.

e. Respondent Processes Takahara's Loan Application

With respect to certain related developments, during the May 24th — May 28th period with which we are now concerned, Baidack testified — without contradiction — that Landa, during one conversation, had asked whether he [Baidack] felt there was any reason "other than monetary" that might have persuaded Honsport's warehouse workers to seek Union representation. Respondent's general manager had replied that he did not know, but "believed" there were no other reasons. When Zale's assistant general counsel asked, then, whether he knew who might have "gone to the union" seeking unionization, Baidack had speculatively noted the possibility that Truckdriver Takahara might have done so.

> (According to Baidack, Landa had commented, then, that they "really couldn't go out and find out directly" whether Takahara had been responsible. Assistant Manager Yamaguchi, so Baidack testified, had — thereupon — been requested to determine "indirectly" what Takahara's role, if any, had been.)

The following day, Baidack notified Zale's assistant general counsel — so his undenied testimony shows — that Takahara had applied for a loan, one week previously, from Zale Corporation's Dallas-based employees' credit union. According to Baidack's recollection:

> Mr. Landa said that if we pushed the loan through, it would probably go a long way to swaying Tommy Takahara if he had been, in fact, the one involved in seeking the union. At which time a phone call was made to Dallas by Mr. Landa. I do not recall specifically who he spoke to . . . He told [the party called] that we had a union problem or potential union problem here in Hawaii; that it appeared that Tommy Takahara could be influential in the case; that it would behoove us to put through this loan as quickly as possible.

The record warrants a determination, which I make, that Takahara's loan application — which might, otherwise, have

been processed, routinely, within a two or three week period — was thereupon given expedited consideration. The truckdriver's loan check, from the credit union, reached Baidack's desk on Monday, May 31st.

While a witness, Vice President Gart testified — credibly and without contradiction — that before this, he, personally, had sometimes taken action calculated to speed up credit union processes in connection with personal loan applications. The Sporting Goods Division's vice president cited several instances when he had "walked a check through" personally, after being notified that some "problem" existed, and that the loan applicant needed his requested funds forthwith. Gart disclaimed any knowledge with regard to Takahara' loan, particularly, but declared that Landa's conduct had not lacked precedents.

Nothing within the present record, however, would warrant a determination that Truckdriver Takahara was ever told his loan application had been processed with particular expedition.

4. Representation Case Proceedings

On June 1, 1976, pursuant to notices previously given, this Board's Sub-Regional Office conducted a hearing on Complainant Union's representation petition. The parties stipulated that Respondent's full-time and regular part-time warehousemen and truckdrivers, within its Honolulu warehouse facility, save for "office clerical" employees, guards and statutory supervisors, constituted a unit appropriate for collective bargaining purposes. Complainant Union contended, however, that Warehouseman Richard Moratin, newly hired, and Freight Claims Clerk Alvin Moratin, Jr. should be excluded because they are the sons of Alvin Moratin, Senior, Respondent's warehouse manager. Respondent, sought their inclusion, contrariwise.

Respondent's representatives contended, further, that Freight Claims Clerk Moratin, Junior, together with Inventory Control Clerk Karen Schubach, should be included

within their firm's warehouse unit as plant clericals. Complainant Union took no position with regard to these contentions.

> (When the complaint case, with which we are now concerned, was heard, testimonial and documentary evidence revealed that Karen Schubach had ceased working for Respondent within a few weeks after this Board's hearing on Complainant Union's representation petition. She had been hired, so the records show, to replace — temporarily — Honsport's regular inventory control clerk, Carol James then on maternity leave.

Subsequently, within a July 1st Decision and Direction of Election, issued by the Board's Regional Director with jurisdiction, Warehouse Manager Moratin, Senior's sons were found "includable" within Complainant Union's petitioned-for bargaining unit; both plant clerical workers, previously noted, were likewise found properly included within Honsport's warehouse complement.

5. Complainant Union's Reaction

a. Respondent's Workers Receive Their Raises

Throughout the period with which we have been concerned, Respondent maintained bi-weekly pay periods, which — so the record shows — terminated on alternate Fridays; on the following Thursdays or Fridays, Respondent's warehouse workers received their paychecks.

During the period with which we are presently concerned, Respondent's bi-weekly pay periods terminated on May 28th and June 11, 1976, respectively. The record warrants a determination — which I make — that, presumably on June 3rd, Respondent's warehouse workers were paid, for the two-week period which had ended May 28th, on the basis of their "old" pre-April 10th rates of pay. However, with respect to their next pay period — namely, the two-week period with a June 11th closing date — the firm's warehouse workers were

paid consistently with Respondent's newly formulated rate ranges; their checks, further, included retroactive pay for two prior pay periods running back to May 1st, separately computed at their newly-set rates.

> (Honsport's five senior warehousemen received hourly rate raises, dependent upon their periods of service, which ranged from $.92 to $1.22 per hour. Warehouseman Richard Moratin, with a May 4, 1976 date of hire, was granted Respondent's newly formulated service entry rate. Takahara, Respondent's truckdriver, received a $1.48 raise. Alvin Moratin, Junior, received a $.35 wage increase. The record does not reveal Inventory Control Clerk Schubach's modified pay; when Carol James subsequently resumed work in Respondent's warehouse, on July 5, 1976 she received a $1.31 raise over her previous pay rate.)

Herein, General Counsel's documentary submission — derived from Respondent's records — reveals that the firm's wage rate adjustments, in some cases, may have deviated, slightly from those which its newly formulated rate ranges would, presumably, have required. Warehousemen Yamamoto and Ragasa, so the record shows, were granted raises within Honsport's relevant rate range, for their job classification, properly geared to their periods of service; Richard Moratin was correctly granted compensation which matched the firm's new entry-level rate. Timothy Culkin, however, was granted a rate properly payable *after* three months of service, though he had not, by May 1st, finished his probationary period. Warehouseman Hasegawa and Leomo were given raises, correctly geared to their periods of service, but derived from Respondent's revised warehouse *clerical* rate range; the record suggests, however, that, subsequent to May 1st, they may have been performing clerical duties. Alvin Moratin, Junior, with two years, eight months of prior service, *in totto*, had worked slightly more than three months before May 1st, as Respondent's freight claims clerk; nevertheless, he was assigned a wage rate, within the clerical rate range, purportedly

payable after nine months of service. Together with these presumptively beneficial wage level changes, however, Respondent's management made two less generous miscalculations. Takahara, despite eleven years of service, was raised to a compensation level, within his rate range, payable after "57" months of service; he was not granted his rate range maximum, which he should have been granted, until six months later. Carol James, with a nominal "21" month gross service record when she resumed work in July, 1976, was granted a raise, commensurate with her service record, within the *warehousemen's* rate range; consistently with Respondent's new *clerical* rate range, she could have been given $.10 more per hour.

Complainant Union's business representative testified, credibly and without contradiction, that, following the June 1st representation case hearing, he continued to call Jumbo's Dim Sum-In restaurant meetings, for Respondent's warehouse workers. However, when these workers finally received their retroactive raises — so Business Agent Reed's credible testimony shows — they no longer responded when notified of Complainant Union's scheduled meetings. According to Reed, only one worker, whose name he could not recall, reported.

b. Complainant Union's Charge

On June 21, 1976 Complainant Union's Business Representative signed a formal Board charge, wherein Respondent was charged with the commission of Section 8(a)(1) and (5) statutory violations, dating back to June 11th specifically. The Board's record, however, shows that this charge was *filed* on July 22nd. No rationale for Complainant Union's presumptive failure to file its charge, promptly, has been proffered for the present record.

(Conceivably, the charge's date notation, showing that Business Agent Reed had signed it on June 21st, may reflect a simple draftman's or typist's mistake. The charge could have been signed on July 21st; then, it could

have been filed the following day. While a witness, however, Reed proffered no such contention.)

On January 10, 1977, this Board's Regional Director notified Complainant Union's counsel that — since a Complaint and Notice of Hearing has been issued, based upon Complainant Union's July 22, 1976 charge — the representation petition previously filed would be dismissed — subject to reinstatement, should such action be deemed appropriate, upon Complainant Union's application following some disposition of the present complaint proceeding.

c. Discussion and Conclusions

Consistently with well-settled decisional doctrine, this Board has noted — frequently — that wage increases granted during union organizational campaigns may not be considered, *per se*, statutorily proscribed. The Board's conclusions, as to whether such wage increases, or benefits conferred, have transgressed permissible limits, must derive — rather — from subsidiary determinations, bottomed upon each case's particular cirumstances, with respect to whether the concerned employer's grant was calculated to interfere with the self-organizational rights of workers, or to thwart a labor organization's campaign for representative status. *N.L.R.B.* v. *Exchange Parts Company,* 375 U.S. 405; *Centralia Fireside Health, Inc.* 233 NLRB No. 31 (Slip Opinion, p. 4), and cases therein cited. Mr. Justice Harlan, within the Supreme Court's *Exchange Parts* decision, noted that:

> The precise issues [which this case presents] is whether [Section 8(a)(1)] prohibits the conferral of [economic] benefits, without more, where the employer's *purpose* is to affect the outcome of the [representation] election . . . We think the Court of Appeals was mistaken in concluding that the conferral of employee benefits while a representation election is pending, *for the purpose of inducing employees to vote against the union*, does not "interfere with" the protected right to organize. . . . We have no doubt that [Section 8(a)(1)] prohibits not only in-

> trusive threats and promises but also conduct immediately favorable to employees *which is undertaken with the express purpose of impinging upon their freedom of choice for or against unionization* and is reasonably calculated to have that effect. (Bracketed material inserted to promote clarity. Emphasis supplied.)

This Board, with judicial concurrence, has long recognized that the statute, thus construed, places many concerned employers in difficult positions, when business circumstances would dictate some revision of their wage structures following their receipt of notice with respect to representation proceedings filed. *McCormick Longmeadow Stone Co., Inc.* 158 NLRB 1237, 1241-1243. Compare *Sta-Hi Division, Sun Chemical Corporation* v. *N.L.R.B.* (C.A. 1, August 16, 1977) 96 LRRM 2051, 2055; *The Singer Company, Friden Division,* 199 NLRB 1195, 1196. In *McCormick Longmeadow Stone,* Trial Examiner Reel defined the statute's mandate — with Board concurrence — positively; his formulation read as follows:

> An employer's legal duty in deciding whether to grant benefits while a representation case is pending is to determine that question precisely as he would if a union were not in the picture. If the employer would have granted the benefits because of economic circumstances unrelated to union organization, the grant of those benefits will not violate the Act. On the other hand, if the employer's course is altered by virtue of the union's presence, then the employer has violated the Act, and this is true whether he confers benfits because of the union or withholds them because of the union (emphasis supplied).

However, determinations thus required, with respect to whether some particular benefit had been conferred "because of economic circumstances unrelated to union organization" or derived from a concerned employer's decision which had been "altered by virtue of the union's presence" primarily — cannot be lightly reached. When financial rewards — pay raises or fringe benefits — have been granted workers, within

a situational context which reflects statutorily proscribed statements or conduct, conclusions regarding the concerned employer's statutorily proscribed "purpose" may be readily drawn. Likewise, when managerial declarations or conduct — which might not, themselves, call for statutory proscription — nevertheless reflect a concerned employer's campaign to forestall unionization, the presence of some forbidden motive, for benefits conferred during a representation case's pendency, may reasonably be deduced. In *Exchange Parts,* the Supreme Court declared, with respect to such determination, that:—

> It is true, as the court below pointed out, that in most cases of this kind the increase in benefits could be regarded as "one part of an overall program of interference and restraint by the employer," . . . and that in this case the questioned conduct stood in isolation. Other unlawful conduct may often be an indication of the motive behind a grant of benefits while an election is pending, and to that extent it is relevant to the legality of the grant; but *when as here the motive is otherwise established,* an employer is not free to violate Section 8(a)(1) by conferring benefits simply because it refrains from other more obvious violations (Emphasis supplied).

And this Board has, frequently, found benefit grants properly subject to statutory proscription — consistently with this Supreme Court language — because their "nature" and "timing" presuasively demonstrated their character as responses to some labor organization's representation campaign. See, e.g., *Montgomery Ward & Co., Inc.,* 220 NLRB 373, enfd. 554 F.2d 996 (C.A. 10); cf. *Laars Engineers, Inc.* 142 NLRB 1341, 1344-1345, enfd. on this point, 332 F.2d 664 (C.A. 9), in this connection.

In recent years, however, several decisions have reflected this Board's recognition, with judicial concurrence, that its decisional principle — whereby concerned employers, constrained to determine whether benefits should be granted during a representation case's pendency, must determine that

question precisely as they would if a union were not in the picture — will sometimes generate managerial dilemmas. See, e.g., *Sta-Hi Divison, Sun Chemical Corporation*, v. *N.L.R.B.*, 560 F.2d 470 (C.A. 1), enfg. 226 NLRB No. 123; *The Singer Company, Friden Division*, 199 NLRB 1195, 1196. In *Sun Chemical*, the Court of Appeals commented that: —

> We are not unsympathetic with an employer who, having decided to increase his employee's wages, finds himself trying to navigate a "perilous" course between the *Scylla* of a violation of the Act for granting a wage increase to his employees when a representation election is pending, and the *Charybdis* of a violation of the Act for withholding such an increase when an election is pending.

This Board's decisions, however, have suggested several "escape" routes whereby such putative dilemmas may be avoided. For example, the Board notes, within its *Singer Company* decision, that — while grants or promises of benefits during a critical preelection period will be considered, *prima facie*, statutorily proscribed — concerned employers may escape statutory sanctions, by coming forward with some explanation, other than a representation vote's pendency, for the timing of their particular benefit's grant or proclamation. See, for example, *Centralia Fireside Health, Inc.*, 233 NLRB No. 31 (Slip Opinion, p.4), *Micro Measurement*, 233 NLRB No. 6 (Slip Opinion, pp.2-3), *Aircraft Hydro Forming, Inc.*, 221 NLRB 581, 585-586. In short: Whenever General Counsel's presentation, regarding some particular benefit's nature, significance and timing, can be considered sufficient to provide a *prima facie* demonstration of statutorily proscribed interference, the "burden of proceeding" will necessarily be shifted; respondent firms, then, must — first — establish that their challenged benefit grant was consistent with a previously formulated program or prior practice, and — secondly — justify the temporal coincidence between some labor organization's bid for representative status and their benefit's conferral. Compare *Colonial Haven Nursing Home, Inc.*, 218 NLRB 1007, 1008 [fn. 5] 1017, enfd. in material part 542 F.2d 691 (C.A. 7), in this connection.

To put the matter differently, respondent firms charged with benefit grants presumptively conferred for some "express purpose" statutorily proscribed, must demonstrate that such grants, regardless of their nature and timing which could be suspect, really reflect no prior "course alteration" motivated by a labor organization's presence.

In most cases, such defensive demonstrations have compassed testimonial and documentary proffers calling for determinations: *First,* that challenged benefit conferrals had been based upon the designated respondent's regular practice, or based upon plans specially formulated before any labor organization's campaign had commenced, or became known; *Second,* that some notice, regarding a prospective grant, bottomed upon such a respondent's previously formulated plan or regular practice, had been communicated to concerned employees, preferably before any labor organization's known advent; *Third,* that procedures subsequently followed, and benefits finally conferred, had been consistent with the particular respondent firm's regular practice, or previously formulated program.

2. Respondent's Pay Raises

The present record, clearly, warrants a determination — which I make — that, during the period with which we are concerned, Respondent's compensation policy did, indeed, derive from established practices and procedures, which predated Complainant Union's representation bid. Zale Corporation's policy and procedure manual, throughout the period with which we are concerned, had called for periodic performance reviews, pursuant to which qualified workers might be granted raises within prescribed rate ranges. Those rate ranges — formulated to be generally "competitive" with prevailing wage rates currently being paid for comparable positions within the local community — have, historically, been derived from area wage surveys.

(Zale Corporation's manual, so far as the record shows, prescribes no fixed time interval within which wage

surveys previously conducted should be reviewed, reconsidered or brought up to date. Presumably, renewed surveys have been conducted whenever, within management's judgment, conditions within a particular labor market have persuasively suggested their desirability.)

At Honsport, General Manager Baidack had, consistently with Zale Corporation's manual directive, formulated October, 1975 rate ranges for Honolulu warehouse personnel. Those ranges had, *ostensibly,* been bottomed upon previously collected "survey" data.

(The fact that Baidack's purported survey data may not have reflected, correctly, the local pay scales prevailing, for warehouse personnel, within Honolulu's labor market specifically, cannot — within my view — detract from their presumptively "objective" character; their *validity*, however, will be considered further, within this decision.)

Respondent's written "Warehouse Personnel Pay Scales" policy had, finally, provided for semi-yearly April 1st and October 1st performance reviews, which would be prerequisites for raise recommendations. While the present record provides no persuasive clue, relative to Honsport's prior October, 1975 compliance with its formally promulgated compensation policies, there can be no doubt that such policies do provide a quintessential background for subsequent developments, with which we are presently concerned.

Directly following Warehouse Manager Moratin's April 10th performance reviews, Respondent's warehouse workers had been notified that raises, bottomed upon their meritorious performance records, would be granted. Concededly, no specific raise figures had been mentioned. When Baidack, shortly thereafter, sent Vice President Gart his pay raise recommendations, however, wage increments computed in conformity with Honsport's October, 1975 rate ranges had been specified.

(These developments had, clearly, preceded Business Agent Reed's initial May 6th conferences with Respon-

dent's warehouse workers. Vice President Gart could, conceivably, have "acquiesced" promptly, with respect to Baidack's April 10th raise recommendations; had he done so, no problem worthy of present Board cognizance would, subsequently, have been generated. When Zale's Sporting Goods Division vice president returned Baidack's recommendations, however, while declaring them "inadequate" within his view, his determination necessarily set the stage for subsequent developments, which have generated the present controversy.)

With matters in this posture, there can be no doubt that — so far as Honsport was concerned — two generally recognized preconditions for wage increases, free of statutory taint, had been satisfied. Raises for Honolulu warehouse personnel had been recommended, conformably with a previously — determined company policy — and Respondent's concerned workers had been told that wage increases, bottomed on merit, would be forthcoming — long before Honsport's management learned that Complainant Union claimed representative status.

Considered in totality, however, the present record clearly warrants a determination, which I make, that Respondent's warehouse raises — *when finally granted* — derived from substantially revised rate ranges, formulated, concededly, during a representation petition's pendency. Since most of the firm's raises, granted under such circumstances, ran considerably higher than the step increases which Respondent's general manager had previously recommended, General Counsel's representative seeks a determination, substantially, that such raises — when granted — had not been "consistent" with Honsport's previously promulgated performance review and compensation program.

(Respondent's counsel contends, nevertheless, that his client's various raises had been granted in conformity with "established company policy" whereby workers were supposed to be paid at rates competitive with those being received by other workers performing similar work, within their local communities. This contention, within

my view, raises a different question, which I purpose to discuss, further, within this decision.)

And, mindful of this situation, General Counsel's representative would, now, have this Board simply *infer* that Respondent's course of conduct had been specifically designed to persuade concerned employees that wage increases had been granted, and would be granted, thereafter, without any necessity for Union representation.

Upon this record, however, General Counsel's contention, within my view, carries no persuasive thrust. While Respondent's rate range revisions, coupled with raises purportedly granted consistently therewith, may have followed hard upon management's acquisition of knowledge, with respect to Complainant Union's campaign, the factual record — within my view — will not, *preponderantly,* sustain a determination that the firm's challenged course of conduct had been consciously "undertaken" with a statutorily proscribed "express" purpose. My conclusion, substantially, that Respondent's defensive presentation, with regard to management's motive for challenged conduct, has persuasively overcome General Counsel's *prima facie* case, derives from several considerations.

First: I note that Respondent's May 28th wage increases, with May 1st retroactive dates — though concededly "substantially greater than many increases [which warehouse employees] had received" previously — derived from revised rate ranges, bottomed upon Assistant General Counsel Landa's concluded wage survey; that survey had been conducted, consistently with Zale Corporation's previously established policy, specifically to facilitate the formulation of rate ranges which could be considered "competitive" with those governing the compensation of warehouse workers, generally, within the Honolulu labor market. Essentially, therefore, Respondent's raises, when promulgated, reflected corporate management's "lawful attempt to correct an inequity" which General Manager Baidack's prior neglect had generated.

(When formulating his October, 1975 rate ranges, Baidack had, so he testified, relied upon Zale Corporation's previously determined rate range for *Dallas, Texas* Grade 12 warehousemen, plus further data, never specified, which Warehouse Manager Moratin had purportedly supplied. The present record, however, warrants no determination, whatsoever, regarding the identity of Moratin's presumably local sources; nor will it warrant determinations with respect to his data's then current relevance or reliability. With respect to Baidack's purported reliance upon Zale Corporation's *Dallas, Texas* warehouse scale, I note record documentation which reveals the corporation's September 1, 1975 rate range, for "Grade 12" Dallas warehousemen; that previously determined range was substantially higher than Baidack's October 1, 1975 formulation. In Dallas, Zale's newly-hired warehousemen were, then, being paid $3.14 hourly; Baidack had, nevertheless, set a $2.40 statutory minimum rate. His promulgated October, 1975 warehouse rate range provided for compensation *after twenty-seven months of service* which matched Dallas' *minimum* rate. Dallas warehousemen could qualify for Zale Corporation's *maximum* $3.69 hourly rate following *thirty months of service*; in Honolulu, Honsport warehousemen could not qualify for their compensation schedule's maximum $3.70 hourly rate, until after *fifty-one months* of service. Thus, should this Board consider a determination warranted, *arguendo,* that Respondent's general manager might reasonably have considered current *Dallas, Texas* pay scales relevant — when drafting his October, 1975 rate ranges — there would be clear warrant for a further determination that Baidack must have relied upon patently obsolete data. Further, I note — officially — that the Federal Government considers Honolulu, Hawaii a high cost-of-living area, wherein compensation levels, generally, run higher than "mainland" rates paid for comparable work. From all this, I conclude that Baidack's October, 1975 warehouse pay scales, *when formulated,*

were clearly less than competitive, within the Honolulu labor market; certainly, six months later, their gross failure to provide competitive compensation, consistently with corporate policy, could have been readily perceived. However, Respondent's general manager, so far as the record shows, never considered a renewed warehouse wage survey, centered on local firms — which might conceivably dictate rate range revisions — necessary.)

Vice President Gart had, during his March, 1976 visit, noted Baidack's previously tolerated deviation from the March-September performance review schedule which — pursuant to his direction — Zale's Sporting Goods Division generally followed. He had specifically directed Respondent's general manager to "get on to the division schedule" forthwith; Baidack, however, had not complied. When Honsport's belated April 10th, Form 515 raise recommendations were finally submitted, Gart had — so I have found — labeled them "inadequate" promptly; he had returned them for revision. The vice president's reaction had predated Complainant Union's designation card solicitation; clearly his request for more realistic raise recommendations had not been motivated thereby.

Nevertheless, between April 15th and May 10th, Respondent's general manager had taken no steps whatsoever — so far as the record shows — calculated to suggest compliance with his divisional supervisor's directive. Thus, when confronted — shortly thereafter — with word of Complainant Union's representation bid, Zale Corporation's management representatives were presented with choices to be made between three conceivable courses: *One,* Vice President Gart could, conceivably, have reversed his April 15th decision; Baidack's previously recommended raises — despite their derivation from two carelessly formulated rate ranges, and their clear failure to match competitive Honoluly wage levels — could, nevertheless, have been granted; *Two,* Respondent could have decided to "postpone" or "suspend" all further action with respect to warehouse raises — despite Moratin,

Senior's prior notice to subordinates that wage increases would be granted — coupling that decision with some public declaration which reflected its desire to avoid the appearance of statutorily proscribed interference with a possible representation vote. Compare *Sta-Hi Division, Sun Chemical Corporation* v. *N.L.R.B.*, 560 F.2d 470, 96 LRRM 2051, 2055 (C.A. 1), enfg. 226 NLRB No. 123 (Slip op., JD, pp. 4-5), *The Singer Company Friden Division,* 199 NLRB 1195, 1196. *Three,* the firm could conduct a current up-to-date wage survey, which Baidack had plainly neglected to conduct; warehouse rate ranges, bottomed thereon, could then be devised; and raises calculated conformably therewith could be granted. Zale Corporation's management representatives cannot be faulted, within my view, for choosing the latter course.

The firm's assistant general counsel — with Vice President Gart's concurrence — merely pursued, to completion, the course of conduct which General Manager Baidack should have pursued, consistently with Company policy, before Complainant Union's campaign for representation rights began.

Thus, no determination could reasonably be considered warranted — within my view — that Respondent's May 28th wage increase grants reflected a course "*altered by virtue of the union's presence*" wholly or partially. *McCormick Longmeadow Stone Co., Inc., supra.* Nor could a determination be considered warranted, within my view, that Respondent's course of conduct, though "immediately favorable" with respect to warehouse personnel, had been "undertaken with the *express purpose* of impinging upon their freedom of choice" relative to unionization. *Exchange Parts Co., supra.* Assistant General Counsel Landa may well have believed that warehouse raises granted, consistently with his revised rate range recommendations, might conceivably generate unfair labor practice charges; concededly, Vice President Gart was told that a corporate decision to grant substantial raises, during a representation proceeding's pendency, would require a difficult, potentially risky, choice. The lawyer's professional counsel, however, could hardly be considered a conscious con-

cession, that such raises — because of their sizeable "nature" and "timing" solely — would necessarily reflect some statutorily proscribed motivation, or that Board charges bottomed thereon would necessarily be considered meritorious.

Second: I note, further, that Respondent has not been charged, herein, with "other unlawful conduct" which could "indicate" statutorily proscribed motives behind the firm's substantial retroactive raises; nor have Respondent's possibly questionable motives been "otherwise" demonstrated, within General Counsel's presentation.

> (Compare *N.L.R.B.* v. *Exchange Parts Co.*, 375 U.S. 405, at pp. 406-407. The Supreme Court, therein, noted that respondent employer had "granted" and "announced" certain fringe benefits within a situational context which compassed managerial declarations clearly reflective of the firm's disparagement regarding unionization.)

Rather, the record, herein, warrants a determination, which I have made, that Zale's assistant general counsel — during his May 24th remarks before Honsport's warehouse personnel — offered no comments, whatsoever, revelatory of Respondent's reaction to Complainant Union's petition. Later, having won Vice President Gart's concurrence, with regard to substantial raises for the firm's warehouse personnel, Landa deliberately refrained from attendance during the workers' May 28th meeting, when General Manager Baidack reported that retroactive raises would be granted, described Respondent's basis for their determination generally, and referred his listeners to Warehouse Manager Moratin for further details. Landa withheld his presence — so his presumably self-serving, but nevertheless credible, testimony shows — because he had previously discussed Complainant Union's representation petition with Respondent's workers; and because — mindful of this — he wished to preclude any possibility that Respondent's warehouse personnel, with him present, might "associate" their raises with Complainant Union's pending bid for representative status. Consistently with Landa's purpose, Respondent's general manager — concededly — neither

mentioned Complainant Union's campaign, nor any prospective respresentation vote, when describing his firm's retroactive raise program.

In short, Respondent's management representatives were — so the record shows — consciously *trying* to deal with their firm's "economic exigency" lawfully. Having determined to grant substantial raises, calculated to correct a clearly "inequitable" business situation traceable to General Manager Baidack's prior misfeasance, Honsport's management — so I have found — deliberately refrained from comments, however mild or factual, which might "direct their employees' attention to the union aspect of the matter" with reasonably foreseeable consequences. Compare *McCormick Longmeadow Stone Co., Inc., supra,* at pp. 1238, 1242-1243. Therein, this Board found that a respondent firm had improperly conditioned wage increase grants "which could have been lawfully instituted without reference to the union" when it notified concerned workers, directly, that prospective raises would be withheld, unless their possible collective bargaining representative, concerned with a pending representation case, would waive its right to file later representation vote objections or Board charges, bottomed thereon. No comparable statements or conduct, reasonably calculated to suggest, or imply, that Respondent's workers might be well advised to foreswear Union representation, can properly be charged to Zale Corporation's counsel or Honsport's managerial spokesmen.

This Board has, of course, held heretofore — twice at least, so far as I can determine — that fringe benefits conferred or reaffirmed, specifically to correct a presumptive "inequity" negligently generated, or to match benefits previously conferred on workers elsewhere, merit statutory proscription. However, these cases — within my view — may properly be considered distinguishable.

In *Montgomery Ward and Co., Incorporated,* 187 NLRB 956, the designated respondent's labor relations manager had — during the critical period preceding a scheduled representation vote — reaffirmed a specific fringe benefit, previously

promulgated and generally provided throughout his firm's multi-state operations, which local management, within a particular retail facility, had, mistakenly, failed to provide. The record, considered in totality, revealed — however — that the firm's labor relations manager had reaffirmed his company's negligently "overlooked" benefit policy, within a situational context which compassed several Section 8(a)(1) violations. Further, the Board found that Montgomery Ward's labor relations manager had — during a subsequent speech directed to concerned workers — specifically mentioned the fringe benefit reaffirmed, while prophesying that his listeners would derive "absolutely nothing" from union representation.

Herein, no concurrent unfair labor practices, beyond Honsport's retroactive raises, have been charged. Further, neither Zale Corporation's counsel, nor Respondent's local management, have been charged with statements or conduct calculated to suggest any significant relationship between their firm's newly granted raises and Complainant Union's campaign, or prospective representation case developments.

In *Freemont Manufacturing Company,* 224 NLRB 597, 602-603 enfd. 95 LRRM 3095 (C.A. 8), the designated respondent's management had — shortly following the commencement of a labor organization's representation campaign — distributed a worker's handbook wherein various newly defined fringe benefits, never previously provided within the particular facility concerned, were listed. The company's management contended that these "new" benefits had been provided because they had decided to provide workers, within the facility concerned, with the same benefits which their fellow workers, within another corporate facility, had previously been given. However, this Board rejected the company's defense. It noted: *First,* that no supportive documentation, with respect thereto had been proffered for the record; *Second,* that no legitimate business concerns, which might reasonably have dictated the implementation of novel fringe benefit programs during a representation campaign, had been demonstrated *Third,* that such fringe benefits had been pro-

vided within a situational context which revealed further unfair labor practices; *Fourth,* that no testimony had been proffered, calculated to show that new fringe benefits had been long planned, or that their promulgation was unrelated to management's knowledge that a designation card drive was in progress. Mindful of these considerations, this Board found the company's fringe benefit grants "designed to thwart" self-organization.

Herein, however, Respondent's defensive presentation could hardly be considered comparably deficient. Documentation, generally supportive of Respondent's position, has been proffered; no concurrent unfair labor practices, which could reasonably have provided some "indication of the motive" behind Respondent's raises, have been proven; testimony revelatory of Respondent's presumptively "legitimate" business concerns, which might reasonably be considered a sufficient justification for raises granted during a critical pre-election period, has been proffered.

More particularly, with respect to pay raises, granted during a representation case's pendency, which reflect a concerned firm's clear " departure" from prior wage increase practices, policies or programs, this Board has, likewise, twice at least, found Section 8(a)(1) violations. Again, however, these cases — within my view — may properly be distinguished from the case with which we are presently concerned.

In *Styletek, Division of Pandel-Bradford, Inc.,* 214 NLRB 736, enfd. 520 F.2d 275 (C.A. 1), the designated respondent's management had, some time previously, promised workers "cost-of living" raises, comparably with raises which had previously been granted. Shortly before a scheduled representation election, however, Respondent had restructured job classifications and wage rates. Varying wage increases, consistent with the firm's restructured rate schedule had, then, been granted. The Board found these wage increases violative of law. It noted: *First,* that "job inequities and company growth" had been proffered as Respondent's proper "business justifications" for wage structure revisions;

Second, that Respondent had, nevertheless, sought no remedy for these "problems" until a labor organization's representation campaign had been underway for some three months; *Third,* that Respondent's workers had not been notified of Respondent' plan to restructure job classifications and wage rates, save until another month had passed; *Fourth,* that Respondent's plan had been formally announced and implemented two months later, two weeks before a scheduled representation vote. Upon this record, the Board found "inferences" warranted that Styletek's conduct had been motivated, partially at least, by an antiunion purpose.

Herein, however, determinations have been found warranted that Zale's Sporting Goods Division vice president, newly vested with direct "line" responsibility for Honsport's operations, had developed concern with regard to Respondent's warehouse wage structure — pursuant to which presumptively "inadequate" periodic raises had been recommended — sometime *before* Complainant Union's designation card campaign began. Confronted, thereafter, with a business situation — which General Manager Baidack's prior reglect had generated, and with respect to which requested remedial action had been, inexplicably, delayed — the divisional vice president had reacted promptly. True, Complainant Union's petition had, by then, been filed. With a prospective representation vote foreseeable, Respondent was, however, required to refrain from conduct deliberately "undertaken" with a manipulative purpose, merely; the statute does not mandate paralysis. See *N.L.R.B.* v. *Styletek, Division of Pandel-Bradford, Inc.,* 520 F.2d 275, 280-282 (C.A. 1). Therein, the Court of Appeals commented that: —

> Merely by coming on the scene and starting to organize, a union cannot prevent management from taking reasonable steps to run its business properly.

Respondent's management representatives, herein, proceeded to conduct required wage surveys and formulate revised rate ranges, forthwith; consciously, however, they sought to preclude any possible "inference" that wage increases, bot-

tomed upon revised rate ranges, had been "timed" deliberately, for the purpose of maximizing their manipulative " impingement" upon Honsport's warehouse workers' freedom of choice. In this connection, Assistant General Counsel Landa testified as follows:

> Q. Now, why, during your conversation with Mr. Gart on the 26th, did you tell Mr. Gart that you wanted a decision right away rather than wait? A. I was concerned that if a decision was made to increase the wage rates, to change the rate structure, and it was done any later that we would be running into an election, and it would occur just before the election and interfere with the employees' rights . . .
>
> Q. (By Mr. Jossem) Well, put it this way: Based on your knowledge and experience with Board proceedings, what would have happened if you had told Mr. Gart, "Take your time. Bill. Let us know when you have decided what you're going to do about the raises?" A. The decision [on the unit and the direction of the election] could have been handed down by the Board by the time Mr. Gart had made up his mind . . .
>
> Q. What would that mean with respect to the relation of the timing of the increase and the election? A. It would have been grounds for an objection to the election. It would affect — would have affected the finality of the election one way or the other.
>
> Q. Was that the reason why you told Mr. Gart you wanted the decision right away? A. Yes.

In *Styletek,* this Board found — with judicial concurrence — that the respondent firm had not satisfied its heavy "burden to explain" why it had announced restructured wage rates and job classifications, together with wage adjustments bottomed thereon, two weeks before a scheduled representation vote. With respect to this Board determination, the Court of Appeals noted [*Ibid.* at p. 280] that: —

> Wage increases and associated benefits may be well warranted for business reasons; still the Board is under no

> duty to permit them to be husbanded until right before an election and sprung on the employees in a manner calculated to influence the employees' choice.

However, within my view, Respondent's management spokesmen — herein — have provided a factual justification for their challenged "timing" with respect to pay raises, sufficiently credible to preclude any conceivable "inference" consistent with General Counsel's contention that they were pursuing questionable tactics for a statutorily proscribed motive. No determination could reasonably be considered warranted, upon this record, that Respondent's responsible spokesmen had — like Styletek's management — deliberately "timed" substantial wage increase grants, with a knowing view toward their persuasive impact on workers who would shortly be required to choose "for or against" collective bargaining representation.

In *Montgomery Ward & Co., Inc.*, 220 NLRB 373, Respondent's regional personnel manager had — some time before the commencement of a labor organization's campaign — directed the firm's district managers to conduct area wage surveys; to revise their current rate ranges, based upon such surveys, so that Respondent could remain "competitive" with respect to wages; and to grant specific raises within such revised rate ranges, where warranted, consistently with a defined chronological schedule. Revised wage ranges, for a particular retail facility, had been recommended; however, precise limits — with respect to these rate range revisions — had not been specified. Respondent's regional management had noted its concurrence, however, with these less-than-precise recommendations. Shortly thereafter, a labor organization had requested recognition. When Respondent's local management representatives, subsequently, granted wage increases, they proceeded — so this Board found — without regard for certain determinative standards which Respondent's regional personnel manager had directed them to follow, and without regard for his directive's chronological specifications. Several raises, when finally granted, were presumptively greater than

Respondent's program had purportedly mandated, while raises granted some other workers "fell below" supposedly "competitive" rates for comparable work. While conceding that *Montgomery Ward's* general decision to grant wage increases had been reached before any labor organization's campaign began, and did not reflect a corporate response thereto, the Board found that — since various raises finally granted did reflect local management's deviations from previously defined standards, disregard for previously defined chronological limitations, and departures from previously professed criteria — their "nature" and "timing" reflected a response to the labor organization's campaign.

With respect to Honsport, however, comparably significant deviations from newly revised rate ranges — sufficiently egregious to warrant a determination that such rate range revisions were not, really, considered meaningful — cannot, reasonably, be found.

> (Warehousemen Yamaoto, Ragasa and Richard Moratin were granted raises, within their firm's relevant rate range, correctly computed. Culkin, though granted a rate properly payable *after three months* of service, despite a total service record which covered a *lesser time span* between his date of hire and his raise's May 1st retroactive date — had, nevertheless, substantially competed his probationary period by the time Respondent's paychecks, which reflected the raises, were distributed. Warehousemen Hasagawa and Leomo received raises, correctly geared to their periods of service, but derived from Respondent's revises *warehouse clerical* rate range; however, since the record does suggest that, subsequent to May 1st, they may have been "dual function" workers, performing some clerical duties, no determination that they were being excessively compensated could reasonably be considered warranted, herein. Alvin Moratin, Junior, was granted a new wage rate, within Respondent's warehouse clerical rate range, *greater than his job service record within a clerical classification*

would presumably have warranted; his complete plant service record within warehouse job classifications, however, would clearly have supported a rate better than $3.75 per hour. Truckdriver Takahara, who should have been raised, forthwith, to his rate range's maximum, instead received a raise to that rate range's penultimate step. Within my view, however, none of these deviations were sufficiently irregular, or sufficiently serious, to warrant a determination that Respondent's management had, consciously, granted raises bottomed upon substantively irrelevant, or purely personal, considerations.)

In short, Respondent's partial nonconformity with newly defined wage increase criteria — which Vice President Gart had approved — carries no persuasive implication, within my view, that statutorily proscribed "interference" with Complainant Union's campaign was *intended*, rather than valid raises. Stated conversely, nothing within the relevant "totality of circumstances" which surrounded Respondent's final June, 1976 retroactive raise payments would, *preponderantly*, warrant a determination that such raises had not been validly granted.

3. Respondent's Treatment of Takahara's Loan Request

Having reached the conclusion herein set forth, I have considered, further, whether the record, with respect to Assistant General Counsel Landa's voluntary suggestion — that Takahara's pending request for a credit union loan should be given expedited consideration — demonstrated Respondent's statutorily proscribed motivation, for various pay raises challenged herein, sufficiently to warrant conclusions consistent with General Counsel's contention. I have concluded that it does not. General Counsel's presentation with respect to Takahara's load request — within my view — lacks sufficient "makeweight" significance to carry the day for General Counsel's position. I note, first, that Landa's undenied telephone suggestion, with regard to Takahara's loan request, has not been challenged, within General Counsel's Complaint, as separately violative of law. Further, no showing has been

made that Respondent's truckdriver was ever notified with regard to Landa's voluntarily-proffered recommendation. Finally, nothing within the present record suggests that Takahara, himself, ever drew relevant "inferences" from his credit union loan check's relatively quick delivery. With matters in this posture, Landa's conduct — within my view — could hardly be considered "reasonably calculated" to "impinge upon" Takahara's freedom of choice, with respect to collective bargaining representation.

4. Conclusions

Essentially, this Board stands presented, upon this record, with a situation wherein Respondent's presumptive "purpose" or "motive" for challenged conduct must be deduced, *solely*, from testimonial and documentary evidence which merely reflects substantially larger wage increases than Honsport's warehouse workers could realistically have foreseen, granted during a Board representation proceeding's pendency. No "other unlawful conduct" sufficient to provide a reliable "indication" with regard to Respondent's motive has been charged or proven; nor has any statutorily proscribed motive been "otherwise" demonstrated. Respondent's defensive presentation — proffered to support its contention that substantial raises were granted, despite a representation proceeding's pendency, specifically to correct a discovered deviation from corporate wage and salary policy, for which Honsport's local management had been responsible — has not been, within my view, persuasively overborne.

Years ago, Mr. Justice Frankfurter, speaking for the Supreme Court in *N.L.R.B.* v. *Donnelly Garment Company*, 330 U.S. 219, 229, commented therein — with reference to a somewhat different problem in deductive reasoning — that:

> According to an early English judge, "The devil himself knoweth not the mind of man," and a modern reviewing court is not much better equipped to lay bare unexposed mental processes.

Triers of fact for regulatory agencies, certainly, cannot claim immunity from the disability described. When, as here, Respondent's never manifested motivation for benefits conferred during a representation case's pendency must be deduced, *solely*, from superficially equivocal conduct, a trier of fact's presumed competence to draw "inferences" cannot, alone, generate the record preponderance required to support a conclusion favoring one determination with respect to motive, rather than another. The testimonial and documentary "preponderance" required, rather, must be a demonstrable *factual* preponderance, sufficient to support whatever deductive inferences may be sought. No such sufficient *factual* record, within my view, has been provided herein. General Counsel's burden of proof, therefore, cannot be considered satisfied; the present complaint, I find, must be dismissed.

Having reached this conclusion, I have not considered Respondent's further contentions: That Complainant Union has failed persuasively to demonstrate majority representative status within a bargaining unit properly defined; that Complainant Union's designation card showing should, in any event, be considered tainted, consistently with the Supreme Court's *Savair* decision; and that no *Gissel* bargaining order, predicated solely upon the course of conduct challenged herein, would be warranted.

* * *

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, as amended, I hereby issue the following recommended order:[1]

ORDER

The complaint is dismissed in its entirety.

Dated: December 15, 1977

/s/ MAURICE M. MILLER
Maurice M. Miller
/s/ *Administrative Law Judge*

[1] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 79-7057

HONOLULU SPORTING GOODS, INC., A SUBSIDIARY OF ZALE CORP., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

ORDER

Petition to Review an Order
of the
National Labor Relations Board

Before: HUG, SCHROEDER AND PREGERSON, Circuit Judges.

The panel as constituted in the above case has unanimously voted to deny the petition for reharing and to reject the suggestion for a reharing en banc.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for reharing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 79-7057

HONOLULU SPORTING GOODS, INC.,
A SUBSIDIARY OF ZALE CORP., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

JUDGMENT

Before: HUG, SCHROEDER AND PREGERSON, Circuit Judges.

THIS CAUSE came on to be heard upon a petition filed by Honolulu Sporting Goods, Inc., A Subsidiary of Zale Corporation, to review an order of the National Labor Relations Board issued against said Petitioner, its officers, agents, successors, and assigns, on January 15, 1979, and upon a cross-application filed by the National Labor Relations Board to enforce said Order. The Court heard argument of respective counsel on April 17, 1980, and has considered the briefs and transcript of record filed in this cause. On May 5, 1980, the Court, being fully advised of the premises, issued a memorandum affirming the Board's Order. In conformity therewith it is hereby

ORDERED AND ADJUDGED by the Court that the Petitioner, Honolulu Sporting Goods, Inc., A Subsidiary of Zale Corporation, Honolulu, Hawaii, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Granting wage increases to its employees for the purpose of influencing their selection of a labor organization as their bargaining representatives; provided, however, that nothing herein shall be construed as requiring Petitioner to vary or abandon any benefits heretofore established.

(b) Refusing to bargain with Hawaii Teamsters and Allied Workers, Local 996, International Brotherhood of Teamsters,

Chauffeurs, Warehousemen and Helpers of America (hereinafter called the Union) as the exclusive representative of a majority of its employees in the below described bargaining unit, found appropriate under Section 9(b) of the Act:

> All full-time and regular part-time warehousemen and truckdrivers employed by Petitioner at its facility located at 2868 Kaihikapu Street, Honolulu, Hawaii; excluding office clerical employees, guards and supervisors as defined in the Act.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act (hereinafter called the Act).

2. Take the following affirmative action which the Board has found necessary to effectuate the policies of the Act.

(a) Upon request, recognize and bargain with the Union as the exclusive bargaining representative of the employees in the above-described appropriate unit and, if an understanding is reached, embody such agreement in a written signed contract.

(b) Post at its warehouse facility in Honolulu, Hawaii, copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 20 of the National Labor Relations Board (Honolulu, Hawaii) after being duly signed by a representative of Petitioner, shall be posted immediately upon receipt thereof, and shall be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Petitioner to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the aforesaid Regional Director in writing, within 20 days from the date of this Judgment, what steps Petitioner has taken to comply herewith.

Endorsed, Judgment Filed and Entered

/s/ RICHARD H. DEANE
Richard H. Deane
Clerk

A TRUE COPY

ATTEST: Richard H. Deane, *Clerk*

APPENDIX

NOTICE TO EMPLOYEES

POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

(Text of Notice unchanged from Board Order, *Supra*, at Appendix B.)

* * *

APPENDIX E

29 USC

§157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

July 5, 1935, c. 372, §7, 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 140.

§158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

§160. Prevention of unfair labor practices

Powers of Board generally

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce.

* * *

Reduction of Testimony to writing; findings and orders of Board.

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay as will effectuate the policies of this subchapter: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further;* That in determining whether a complaint shall issue alleging a violation of subsection (a)(1) or (a)(2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected in affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or

discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

APPENDIX F

HONOLULU SPORTING GOODS CO., LTD.,
A SUBSIDIARY OF ZALE CORPORATION,[1] *Employer*

and

HAWAII TEAMSTERS & ALLIED WORKERS,
LOCAL 996, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, *Petitioner*

Case No. 37-RC-2245

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claim(s) to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(a)(1) and Section 2(6) and (7) of the Act.

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[1] The name of the Employer appears as amended at the hearing.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:[2]

All full-time and regular part-time warehousemen[3] and truckdrivers employed by the Employer at its facility located at 2868 Kaihikapu Street, Honolulu, Hawaii; excluding office clerical employees,[4] guards and supervisors[5] as defined in the Act.

---

[2] The unit description is in accordance with the stipulation of the parties.

[3] Contrary to the Employer, Petitioner would exclude warehouseman *Richard Moratin* and freight claims clerk *Alvin Moratin, Jr.* because they are the sons of warehouse manager Alvin Moratin, Sr., whom the parties have stipulated is a supervisor as defined in the Act. The record reveals that Moratin, Sr. owns none of the Employer's stock and does not participate in the overall management of the Employer's operations. Both Richard and Alvin, Jr. perform duties within the scope of the unit (see footnote 4, *infra.*), under the same working conditions as other unit employees. As there is no evidence that they enjoy any special status or privileges by virtue of their father's supervisory position, it is concluded that Richard Moratin and Alvin Moratin, Jr. are eligible voters and they are, therefore, included in the unit. *Buckeye Village Market, Inc.*, 175 NLRB 271.

[4] The Employer contends that freight claims clerk Alvin Moratin, Jr. and inventory control clerk *Karen Schubach* are plant clerical employees and seeks to include them in the unit. Petitioner takes no position with respect to this issue. The record discloses that Moratin is responsible for checking incoming freight and processing claims for damaged merchandise. In addition to these clerical duties Moratin spends approximately 50 percent of his time performing warehouse duties identical to those of unit employees. Schubach's primary responsibility is maintaining the warehouse inventory logs; she records all warehouse transactions and prepares the paperwork relating to interstore merchandise transfers. Both Moratin and and Schubach enjoy the same benefits, share the same facilities and have frequent contact with warehouse employees. Based upon the foregoing and the record as a whole, it is concluded that Alvin Moratin, Jr. and Karen Schubach are plant clerical employees and they are, therefore, included in the unit.

[5] The parties stipulated, and the record supports the conclusion that general manager *Miles Bardack*, assistant general manager

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their states as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not bee rehired or reinstated before the election dates and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by Hawaii Teamsters & Allied Workers, Local 996, International Brotherhood of Teamsters.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election shall have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.* 156 NLRB 1236 (1966), *N.L.R.B.* v. *Wyman-Gorden Company*

Lawrence Yamaguchi and warehouse manager *Alvin Moratin, Sr.* are supervisors within the meaning of the Act and they are, therefore, excluded from the unit.

394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, 2 copies of an election eligibility list, containing the names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned Officer-in-Charge, Subregion, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the regional office, 450 Golden Gate Avenue, Box 36047, San Francisco, California on or before July 8, 1976. No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1717 Pennsylvania Avenue, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by July 14.

Dated: July 1, 1976 /s/ NATALLE P. ALLEN
Natalle P. Allen

at: San Francisco *Regional Director, Region 20*

Supreme Court, U. S.
FILED
NOV 14 1980
MICHAEL RODAK, JR., CLERK

No. 80-550

In the Supreme Court of the United States

OCTOBER TERM, 1980

HONOLULU SPORTING GOODS COMPANY, LTD.,
A DIVISION OF ZALE CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

QUESTION PRESENTED

Whether the Board, as a remedy for petitioner's unlawful grant of wage increases to its warehouse employees during the pendency of a representation petition and following the union's request for recognition, properly ordered petitioner to bargain with the union.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unpublished. The decision and order of the National Labor Relations Board (Pet. App. 3a-26a) are reported at 239 N.L.R.B. 1277.

JURISDICTION

The judgment of the court of appeals (Pet. App. 83a-85a) was entered on May 5, 1980. A petition for rehearing and suggestion for rehearing en banc was denied on July 9, 1980 (Pet. App. 82a). The petition for a writ of certiorari was filed on October 6, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. App. 87a-89a.

STATEMENT

Honolulu Sporting Goods Co. ("the Company"), after refusing to recognize and bargain with a Union [1] claiming to represent a majority of the Company's warehouse employees, altered the employees' basic wage structure and granted them much larger wage increases than they otherwise would have obtained (Pet. App. 3a-4a). The Board found that the pay raises were granted in response to, and in an effort to undermine, the Union's organizational cam-

[1] Hawaii Teamsters and Allied Workers, Local 996, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

paign and were, therefore, violative of Section 8(a)(1), 29 U.S.C. 158(a)(1), of the National Labor Relations Act (Pet. App. 7a-13a, 21a). The Board further found that the Company's unlawful conduct precluded the possibility of a fair election and warranted the issuance of a bargaining order (*id.* at 21a). The court of appeals affirmed (*id.* at 1a-2a).

The Company no longer challenges the finding that its conduct violated the Act.[2] Rather, it assails the Board's finding that a bargaining order was appropriate to remedy the violation. Secondarily, the Company questions the Board's conclusion that the Union had achieved majority status when the violation occurred.

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[2] However, petitioner incorrectly asserts (Pet. 2, 4) that the Board found the "timing" of the wage increase to be lawful but not the amount. Although the Board found that the Company's decision to grant step increases based on merit and longevity "was made before the advent of the Union's campaign and was not in response to the Union's efforts" (Pet. App. 13a), in finding the revisions in the wage structure and the raises based thereon unlawful, the Board relied on both "the timing and extensive nature of the upward revisions * * *" (*ibid.*). Moreover, petitioner's assertion (Pet. 2-3) that the Company considered the wage structure—as opposed to individual wage levels based thereon—inadequate and undertook a comparative wage survey prior to its knowledge of the Union's recognition demand is contrary to an express Board finding (Pet. 13a):

> [N]o management official took any action directed at securing wage-schedule revisions or the taking of area wage surveys relative to warehouse employees until after the Union requested recognition and filed its petition. And then such action was initiated by Landa, an attorney whose responsibilities were in the area of labor relations, rather than by officials whose responsibilities normally included wage, salary, or personnel administration.

1. It is undisputed that at the time it demanded recognition, the Union had secured valid authorization cards from five of the Company's warehouse employees. Rejecting the Company's contention that the warehouse unit was comprised of 10 employees, the Board concluded that there were only nine, and that consequently the Union enjoyed majority status when its recognition demand was rejected.

The Board based that finding on the following facts (Pet. App. 15a-16a). At all material times there were a total of nine job positions in the bargaining unit. For a number of years, one of those positions had been filled by employee Carol James, an inventory control clerk. During April 1976, however, James was granted maternity leave with a scheduled July 1, 1976 return date, pursuant to the provisions of the Company's written maternity leave policy.[3] Accordingly, a temporary replacement, Karen Schubach, was hired to fill James' job in the interim. Schubach, who resigned two weeks before James returned as scheduled, held James' position at the time the Union demanded recognition. Although she also held the job at the time the Company announced the unlawful wage increases for regular unit employees, Schubach did not receive a pay raise. Neither she nor James signed a union authorization card.

---

[3] That policy provides, in pertinent part (Pet. App. 16a):

> When an employee requests a maternity leave, the employee's job should not be permanently filled during such leave unless the job is of such a nature that it must be filled and can only be filled if filled by a permanent replacement. The job may be filled on a temporary basis, but any individual hired on such a temporary basis must be informed that the job is a temporary one due to a maternity leave.

The Board concluded that James was properly includable in the unit because she had, at all relevant times, a reasonable expectancy of reemployment (Pet. App. 15a). The Board also found that Schubach was not properly includable since she had been hired on a temporary basis. Moreover, the Company had not, so far as the record revealed, even considered retaining her after James' return, and had not asserted any intent or plan to employ more than nine employees in the Honolulu warehouse facility (*id.* at 16a-17a).

2. Having found that the Union once represented a card majority of the Company's warehouse employees, the Board applied the criteria set out in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 613-615 (1969), and determined that the Company's subsequent unlawful conduct was "so pervasive and extensive that the possibility of erasing its effects on the employees and insuring a fair election by the use of traditional remedies is slight[,] [a]nd, therefore employee sentiment, as expressed by authorization cards, is best protected by a bargaining order" (Pet. App. 19a). The Board explained that although "there was but a single unfair labor practice, * * * it encompassed a massive wage increase whose scope and timing were clearly designed to undermine the Union's majority status" (*ibid.*). In assessing the impact of the Company's conduct upon the election process, the Board quoted, as "directly applicable to the facts herein" (*ibid.*), the following statement from *Tower Enterprises, Inc.*, 182 N.L.R.B. 382, 387 (1970), enforced, 79 L.R.R.M. 2736 (9th Cir. 1972):

> It is a fair assumption that in most instances where employees designate a union as their representative, a major consideration centers on the hope that such representative may be successful

> in negotiating wage increases. Certainly this appears to have been an important consideration in the instant case. A unilateral award of a wage increase by an employer following a union's demand for recognition results in giving the employees a significant element of what they were seeking through union representation. It is difficult to conceive of conduct more likely to convince employees that with an important part of what they were seeking in hand union representation might no longer be needed. An employer may have the right to persuade the employees that representation is not in their best interests, but it does not have the right to threaten them or confer benefits on them which are designed to influence the employees against choosing a representative. When, as here, an employer does so, free choice in a subsequent election becomes a matter of speculation, so long as the effects of the interference remain unremedied.

The Board also cited (Pet. App. 21a) its decision in *Skaggs Drug Centers, Inc.*, 197 N.L.R.B. 1240 (1972), enforced, 84 L.R.R.M. 2384 (9th Cir. 1973), in which the Board explained that a bargaining order was justified in circumstances similar to those presented here because "our traditional remedies, which do not include a requirement that the wage increase be rescinded, cannot eradicate the impact of" an unlawful wage increase designed to thwart employee organizing interest. That "impact would continue to influence employee choice in [an] election were one to be directed * * *." 197 N.L.R.B. at 1241.

3. In affirming the Board's decision and enforcing its order, the court of appeals held that "[i]n light of the timing and the nature of the wage increase," there was substantial evidence to support the Board's

finding that the Company "shifted the wage schedule upward for the purpose of undermining support for the Union" (Pet. App. 1a; citation omitted). The Board's selection of a bargaining order as an appropriate remedy was upheld because, in the court's view, "[t]he evidence also support[ed] the Board's findings that the Union enjoyed majority support at the time that it demanded recognition, and that the unlawful wage increase undermined the Union's strength and prevented a fair election" (Pet. App. 2a).

ARGUMENT

In *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), this Court authorized the issuance of a bargaining order upon a showing that the unrecognized union at one point enjoyed majority status, and that the employer's unfair labor practices, although not "outrageous," "still have the tendency to undermine majority strength and impede the election processes." *Id.* at 613-614. In such circumstances, a bargaining order is proper "[i]f the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election * * * by the use of traditional remedies * * * is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order." *Id.* at 614-615.

1. The Company's primary argument for granting the petition is that the Board "offered no explanation for its issuance of a bargaining order" (Pet. 2), and that therefore the court of appeals' action in sustaining the Board conflicts with various decisions in other circuits requiring the Board to specify why a bargaining order is necessary under *Gissel* (Pet. 6-12). However, as shown above (see pages 4-5,

supra, and see Pet. App. 18a-21a), the Board explained in detail why it viewed the massive wage increase granted here as precluding a fair election and why it considered traditional remedies unlikely to dissipate the effects of the violation. Accordingly, the only question actually presented on this record is whether the facts of this case support the Board's judgment. That evidentiary issue does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490, 494 (1951).

2. There is no merit to the Company's further contention (Pet. 12-13) that the Board departed from precedent in excluding Schubach from the unit. The Board's general policy is that temporary employees "who are employed on the eligibility date and whose tenure of employment remains uncertain, are eligible to vote." *Personal Products Corp.*, 114 N.L.R.B. 959, 960 (1955). And see *NLRB* v. *New England Lithographic Co., Inc.*, 589 F.2d 29, 33-34 (1st Cir. 1978). However, the Board has determined, in a case relied on here (Pet. App. 17a), that an employee expressly hired as a temporary replacement for an employee on maternity leave is ineligible to vote in a representation election. *Fearn International, Inc., Eggo Foods Div.*, 209 N.L.R.B. 232, 236-237 (1974). Therefore, the only issue actually raised by the petition is whether the Board properly found that Schubach was a temporary replacement for James. That issue turns on the particular facts of this case and does not warrant review by the Court.[4]

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[4] The Company's contention (Pet. 4, 12-13) that Schubach was expressly included in the unit by the Board's Regional Director in her Decision and Direction of Election in the representation proceeding (Pet. App. 90a-93a) is incorrect. As the Board pointed out, the Regional Director only found

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

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NOVEMBER 1980

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that the position held by Schubach at the time of the representation hearing—that of inventory control clerk—was a plant clerical position and, therefore, properly includable in the warehouse bargaining unit. No issue as to Schubach's individual status as a temporary or permanent employee was either raised or discussed in that decision (*id.* at 17a, 91a).

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